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2543
No. 11991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALVA G. BLANCHARD,

Appellant,

vs.

J. L. PINKERTON, INC., and J. L. PINKERTON,

Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 312, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California

Central Division

FILED

OCT 26 1948

PAUL P. O'BRIEN,

CLERK

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and

WILLIAM C. BABCOCK

Long Beach, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California
Central Division
Civil No. 7734-Y

Complaint for Infringement of United States
Letters Patent Nos. 2,199,611 and 2,233,395

ALVA G. BLANCHARD,

Plaintiff,

vs.

J. L. PINKERTON, INC., a corporation, and
J. L. PINKERTON,

Defendants.

BILL OF COMPLAINT

Comes now the plaintiff in the above entitled suit and files this his bill of complaint against the defendants herein, and for cause of action alleges that:

I.

This is an action arising under the patent laws of the United States and this Court has jurisdiction thereunder.

II.

On May 7, 1940, United States Letters Patent No. 2,199,611 were duly and regularly issued for an invention and improvement in "Valve Operating Structures"; and on May 4, 1941, United States Letters Patent No. 2,233,395 were duly and legally issued for an invention in "Safety Apparatus for Boilers"; and plaintiff is the owner of those Letters Patents and all [2] rights thereunder.

III.

Without the license or consent of plaintiff, and in infringement of said Letters Patent, and each thereof,

the above named defendants have jointly and severally, or jointly or severally, for some time past, and at divers and sundry times within the six years last past, within the said Southern District of California, Central Division thereof, and elsewhere, the extent of which is to plaintiff unknown, prior to the commencement of this suit, manufactured, offered for sale, sold, offered for use, used and caused to be used Valve Operating Structures and Safety Apparatus for Boilers embodying and containing the said patented inventions disclosed in and by said Letters Patents, and have thereby infringed upon said Letters Patents, and threaten and intend to continue to do so unless enjoined therefrom by this Court.

IV.

Plaintiff has placed the required statutory notice on all Valve Operating Structures and Safety Apparatus for Boilers sold by him under said Letters Patents, and has given written notice to defendants of their said infringement.

Wherefore, plaintiff demands a final injunction against further infringement by defendants and those controlled by defendants, an accounting for profits and damages, and an assessment of costs against said defendants.

ALVA G. BLANCHARD

Plaintiff

HAMER H. JAMIESON

Attorney for Plaintiff

[Endorsed]: Filed Oct. 31, 1947. Edmund L. Smith,
Clerk. [3]

[Title of District Court and Cause]

ANSWER

Come now the defendants, J. L. Pinkerton, Inc., a corporation, and J. L. Pinkerton individually, the defendants above-named and for answer to the complaint on file herein, admit, deny and allege as follows:

I.

Defendants deny generally and specifically each and every allegation contained in paragraphs II, III and IV of said complaint except that said patents were issued by the Commissioner of Patents and notice of alleged infringement thereof was given to defendants.

As Further and Affirmative Defenses Defendants Allege:

II.

That said patents Nos. 2,199,611 and 2,233,395 and all of the [4] claims thereof are invalid for lack of novelty because:

A. The subject matter claimed in said patents had, long prior to the alleged invention thereof by plaintiff or more than two years prior to his applications for said patents, been described in various United States and foreign patents and in various publications among which are the following:

United States

Patentee	Patent No.	Date
Wyatt	105,289	July 12, 1870
Amundsen	227,145	May 4, 1880
House	521,166	June 12, 1894
Parsons	590,905	Sept. 28, 1897
Wright	668,302	Feb. 19, 1901
Baldwin	716,982	Dec. 30, 1902
Williams	728,348	May 19, 1903
Humphrey	796,516	Aug. 8, 1905
Timm	1,055,000	Mar. 4, 1913
Fulton	1,131,690	Mar. 16, 1915
Elger	1,214,443	Jan. 30, 1917
Brown	1,584,007	May 11, 1926
Smith	1,629,055	May 17, 1927
Roberts	1,694,626	Dec. 11, 1928
Fisher	1,754,013	Apr. 8, 1930
Viberg	1,957,087	May 1, 1934
Parker	1,965,052	July 3, 1934
Slagel	1,986,376	Jan. 1, 1935

Foreign Patents

Great Britain

Weir et al.	429,070	May 23, 1935
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France

375,308	July 5, 1907
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B. The subject matter claimed in said patents had, long [5] prior to the alleged invention thereof by plaintiff been known and used in the United States by the applicants for the patents listed in Paragraph A above at the addresses set forth in said patents, by the authors and publishers of the publications listed in Paragraph A above

at the addresses set forth in said publications, and by many other persons whose names and addresses are at present unknown to defendants but for which they are causing diligent search to be made.

C. The subject matter claimed in said patents had, long prior to the alleged invention thereof by plaintiff, or more than two years prior to his application for said patents, been in public use or on sale in the United States by the applicants for the patents listed in Paragraph A above at the addresses set forth in said patents, by the authors and publishers of the publications listed in Paragraph A above at the addresses set forth in said publications, and by many other persons whose names and addresses are at present unknown to defendants but for which they are causing diligent search to be made.

III.

That said Patents Nos. 2,199,611 and 2,233,395 and all claims thereof are invalid for lack of invention because:

A. Each and every element and feature disclosed in said patents as well as the use, function and effect thereof, both singly and in diverse associations and combinations, was well known in the art long prior to the alleged invention thereof by plaintiff and the conception and production of the subject matter claimed in said patents did not amount to invention but was nothing more than the exercise of the ordinary and expected skill of persons familiar with the art to which said patents relate.

B. The alleged inventions claimed in said patents are not patentable combinations but are mere aggregations of old elements and parts which do not cooperate in any new or unexpected way or produce any new or unexpected result.

C. Said claims and each of them fail to describe a statutory [6] subject of invention in that they do not describe any new or useful art, machine, manufacture or composition of matter but on the contrary merely set forth an attempt to patent a function or result.

IV.

That said Patents Nos. 2,199,611 and 2,233,395 and all claims thereof are invalid for failure to comply with the provisions of R. S. 4888 (35 USC 33) in that:

A. Neither the alleged inventions claimed in said patents nor the manner of making or using the same are described in said patents in such full, clear, concise or exact terms as to enable any person skilled in the art to which it appertains to make or use the same.

B. Said claims do not particularly point out and distinctly claim the part, improvement or combination which the applicant therefor claims as his invention or discovery.

V.

That said Patents Nos. 2,199,611 and 2,233,395 and all claims thereof are invalid because the subject matter of said claims was not the sole invention of plaintiff but was the joint invention of plaintiff and others, which fact was well known to plaintiff at the time he filed his applications for said patents.

VI.

That said Patents Nos. 2,199,611 and 2,233,395 and all claims thereof were so limited by requirement of the Commissioner of Patents during the prosecution of said patents as not to be susceptible of a construction which will include any device or apparatus now being made, used or sold by defendants.

COUNTERCLAIM

By way of counterclaim against plaintiff herein these defendants allege:

VII.

That said Patents Nos. 2,199,611 and 2,233,395 and all claims [7] thereof are invalid for the reasons heretofore set forth in Paragraphs II to VI, inclusive, of this Answer and defendants hereby replead and incorporate said paragraphs herein by reference the same as though set forth herein in full.

VIII.

That no structure made, used or sold by defendants or either of them prior to the filing of the Complaint herein infringed any claim of either of said Patents Nos. 2,199,611 and 2,233,395.

IX.

That there is therefore a controversy existing between plaintiff and the defendants in this action which under 28 USC 400 is cognizable by this Court and should be litigated as a counterclaim in this action.

Wherefore defendants pray:

1. That Patent Nos. 2,199,611 and 2,233,395 and all claims thereof be adjudged invalid and void,
2. That defendants and each of them be adjudged not to have infringed either of said Letters Patent or any claim thereof,
3. That the Complaint on file herein be dismissed with costs to the defendants, including their attorneys' fees incurred herein,

4. For judgment on the counterclaim filed herewith that defendants have not, prior to the filing of said counterclaim, infringed said Letters Patent or either of them, and
5. For such other and further relief as to this Court shall seem just and proper. [8]

Dated at Los Angeles, California, this 22nd day of December, 1947.

ROBERT W. FULWIDER and
WILLIAM C. BABCOCK

By Robert W. Fulwider

Attorneys for Defendants [9]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 23, 1947. Edmund L. Smith,
Clerk. [10]

[Title of District Court and Cause]

STIPULATION THAT PLAINTIFF MAY FILE
REPLY TO COUNTERCLAIM IN ANSWER

It Is Hereby Stipulated by and between the parties in the above entitled case, through their respective counsel, that the plaintiff herein may file his reply to the counterclaim in the defendants' answer provided said reply is filed on or before March 29, 1948.

Dated at Los Angeles, California, this 26th day of March, 1948.

HAMER H. JAMIESON

Attorney for Plaintiff

ROBERT W. FULWIDER

Attorney for Defendants

It is so ordered this 29th day of March, 1948.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Mar. 30, 1948. Edmund L. Smith,
Clerk. [11]

[Title of District Court and Cause]

REPLY

Comes now the plaintiff in the above entitled suit and files this his reply to the counterclaim in the Answer on file herein and for reply to said counterclaim admits, denies and alleges as follows:

I.

Plaintiff denies generally and specifically each and every allegation contained in paragraphs VII, VIII and IX of the counterclaim in the said Answer.

Wherefore, plaintiff prays that the prayer of the Complaint herein be granted and a final injunction against further infringement by defendants and those controlled by defendants, an accounting for profits and damages, and an assessment of costs against said defendants be ordered.

HAMER H. JAMIESON

Attorney for Plaintiff [12]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 26, 1948. Edmund L. Smith,
Clerk. [13]

[Title of District Court and Cause]

MEMORANDUM DECISION

Appearances:

Hamer H. Jamieson, Los Angeles, California, for the Plaintiff.

Robert W. Fulwider and William G. Babcock, Los Angeles, California, for the Defendant. [14]

The above-entitled cause heretofore tried, argued, and submitted, is now decided as follows:

(A) As to the Complaint, judgment will be for the defendants that plaintiff take nothing by his Complaint against the defendants or either of them.

(B) As to the counterclaim, judgment and declaration will be entered as follows: (1) That the patent covered by U. S. Letters Patent No. 2199611, issued on May 7, 1940, and patent covered by U. S. Letters Patent No. 2233395, issued on May 4, 1941, are, and each of them is, valid; and (2) that none of the claims are, or were, infringed by the devices made, used or sold by the defendants, or either of them, prior to the filing of the Complaint.

(C) The defendants are allowed their costs and disbursements herein, but no attorney's fees.

COMMENT

By the Complaint, the plaintiff seeks injunction, profits and damages by reason of alleged infringement of the claims of the devices covered by the two patents just referred to. Neither structure is of great complexity. The actual trial of the case consumed less than three days. In addition to trial memoranda, exhaustive briefs have

been filed, covering a total of 270 pages, with plaintiff's opening and closing briefs filling 189 pages. They have received full consideration. [15]

The decision announced states the Court's ultimate conclusions upon the issues presented by the pleadings. In what follows will be indicated, in greater detail, some of the legal bases for the conclusions.

As this is not a full-length opinion, I shall not undertake to discuss in detail all the legal principles urged by the parties to this action. Our aim is merely to indicate, as a guide to counsel in the preparation of findings, the conclusions upon some of the legal and factual foundations which underlie the decision.

I.

Letters Patent No. 2233395

A.

Much of the argument, in so far as it relates to this patent, expounds accepted norms, such as that a pioneer patent is entitled to a broad interpretation of its claims. We have no quarrel with this principle. The specifications designate the scope of the patent:

"This invention relates to improvements in safety devices for boilers."

When dealing with an improvement patent, the structure claimed must be considered in the light of the prior art as it relates to devices in the same field, which, in this case are "safety devices for boilers." The claims must be limited to the "improvements." The specifications may be resorted to in order to resolve ambiguities. They may limit, but they cannot enlarge the claims. [16]

But in the last analysis, if there be infringement, it is the claims that are infringed and not the specifications. And when we are dealing with an "improvement" of a structure which existed before, the patentee is entitled only "to the precise device described and claimed in his patent." (*Boyd v. Janesville Hay-Tool Co.*, 1894, 158 U. S. 260, 267. And see, *McClain v. Ortmayer*, 1891, 141 U. S. 419, 425; *Pacific States Electric Co. v. Wright*, 1922, 9 Cir., 277 Fed. 756; *Keystone Driller Co. v. Northwest Engineering Corp.*, 1935, 294 U. S. 42; *Parrafine Co. v. MacEverlast, Inc.*, 1936, 9 Cir., 84 F. (2) 835; *H. Brinton Co. v. Mishcon*, 1937, 2 Cir., 93 F. (2) 445, 448; *Williams Co. v. Shoe Machinery Corp.*, 1942, 316 U. S. 364, 368-368.)

There is another important consideration. A greater liberality of interpretation of claims obtains, and a greater range of equivalents is allowed, when we are dealing with a patent which has been reduced to practice successfully than when we are dealing with what we call "paper" patents. (See my opinion in *Mantz v. Kersting*, 1939, D. C. Cal., 29 Fed. Sup. 706, 712.) However, great commercial success, in itself, is not a criterion either in determining whether there was invention, or in arriving at its scope. (*McClain v. Ortmayer*, 1891, 141 U. S. 419, 428; *Klein v. City of Seattle*, 1896, 9 Cir., 77 Fed. 200, 204; *Grayson Heat Control v. Los Angeles etc. Co.*, 1943, 9 Cir., 134 F. (2) 478, 481; *Marconi Wireless Co. v. U. S.*, 1943, 320 U. S. 1, 20.) [17]

If the prior art which has been pressed upon the court as a ground for invalidity be considered in the light of these principles, it is evident that, while some of the elements contained in the patented structure are in the

others, the claims here would not read upon any of the references or on the best references: Parker Patent No. 1965052; Sutherland Patent No. 1209355; Horridge Patent No. 930860; Spiller Patent No. 229644; House Patent No. 521166; Baldwin Patent No. 716982. Some of the results achieved by the patent in suit are also obtained by the structures referred to. But, essentially, they are different in that they do not achieve the primary purpose of the present patent, which is automatic safety. Nor do they operate on the same principles. (See *Los Alamitos Sugar Co. v. Carroll*, 1909, 9 Cir., 173 Fed. 280, 284.) Thus taking the measure of the invention from the claims as described, but not enlarged, in the specifications and depicted and exemplified in the drawings, the claims are valid.

B.

By the same token, however, none of the claims is infringed by the devices manufactured by the defendants. This conclusion applies equally to the 1932-1933 construction and installation and to the structures manufactured for general commercial use subsequent to that date. The use of the 1932 structure was not pleaded as a defense, and cannot be considered as anticipation. (35 U. S. C. S. 69(5); and see, [18] *Electric Battery Co. v. Shimadzu*, 1939, 307 U. S. 5, 17.) However, such use may, together with the prior art as disclosed by prior patents in the field, be relied on to show want of invention. Such use may prove lack of invention or limit its scope. (Parrafine

Co. v. MacEverlast, Inc., 1936, 9 Cir., 84 F. (2) 335; Oswell v. Bloomfield, 1940, 7 Cir., 113 F. (2) 377.)

The evidence in the case shows conclusively the installation late in 1932, or early in 1933,—that is prior to the Blanchard application, which is dated October 14, 1935,—of a structure of the type of the accused device. The record furnishes the details of the structure through the testimony of the defendant and of disinterested persons who took part in its construction and installation, at Seal Beach, California. While evidence of prior use must be clear and satisfying, it need not rise to mathematical certainty. (See, *Radio Corporation v. Radio Laboratories*, 1934, 293 U. S. 1, 7-8; *Marconi Wireless Co. v. United States*, 1943, 320 U. S. 1, 34; *Parrafine Companies v. MacEverlast, Inc.*, 1936, 9 Cir., 84 F. (2) 335, 339-340.) The plaintiff argues that the 1932 structure did not anticipate the patented structure. Yet he insists that the accused devices as constructed after the date of the Blanchard application was filed, infringes.

There is a formula which, so far as can be ascertained,—is traceable to *Peters v. Active Mfg. Co.*, 1884, Circuit Court, Ohio, 21 Fed. 319, 321;—and which teaches that “that which infringes, if later, would anticipate, if earlier.” [19]

But as is the case with all laconic formulas, it does not necessarily cover all situations. Recent writers have said so. (*Walker on Patents*, Deller’s Ed., 1937, Vol. I, Sec. 48, pp. 256-257.) However, in the application of the apothegm, the converse is also true. (*Shakespeare Co. v.*

Perrine Mfg. Co., 1937, 8 Cir., 91 F. (2) 199, 202.) The accused devices, subsequent to 1932, are, so far as the record shows, substantially the same as,—if not identical,—with the former device. And even if it be conceded, as contended by plaintiff, that they achieve the same result, there is no substantial identity in components or their equivalents. Absent this, there is no infringement. (*Pacific States Electric Co. v. Wright*, 1922, 9 Cir., 277 Fed. 756; *R. H. Burke v. Brauer Bros.*, 1928, 8 Cir., 33 F. (2) 838, 840-841; *Irvin v. Buick Motor Co.*, 1937, 8 Cir., 88 F. (2) 947, 951-952; *Shakespeare v. Perrine Mfg. Co.*, *supra*, p. 202; and see *Mantz v. Kersting*, *supra*, pp. 709-710.)

II.

Letters Patent No. 2199611

The conclusion reached that there is no infringement of Patent No. 2199611 requires little, if any, elaboration. As in Letters Patent No. 2233395, the number of claims is limited, five in all. Infringement is claimed as to Claims 1, 2, and 5. This application was the result of a requirement of the patent office that the structure of the valve operating device be covered by a separate application. [20]

I am of the view that limited to the structure claimed, the patent is valid and is not anticipated by any of the prior art, such as Baldwin Patent No. 716982; Wright Patent No. 668302; Singleton Patent No. 7767; Humphrey Patent No. 796516; and Wyatt Patent No. 105289.

(See my opinion in *Joyce, Inc. v. Solnit*, 1939, 29 Fed. Sup. 787.)

The device is intended for use in conjunction with the operation of valves and outlets for steam boilers. More particularly, it aims to permit the valves to be opened sequentially in case several steam outlets are used. It is evident that the claims call for a single pin operating a plurality of valves and comprise a plurality of aligned needle valves each with a slot in its valve stem. The slots are of different sizes and a cross pin passes through them all. The float lever by which the pin is operated allows the valves to be opened sequentially. The accused devices do not have slots of different sizes in their valves, nor do they have a single pin extending through slots in the valve stems or operating both valves. Pinkerton also uses two separate pins located at two different places, to operate two separate valves in different manners. So, admitting that the result is the same, the means by which it is achieved are so dissimilar from those of the patent in suit as to prevent, under the authorities already cited, a finding of infringement. (See, *Standard Mirror Co. v. Brown*, 1940, 7 Cir., 113 F. (2) 379, 380.) [21]

Hence the conclusions above announced.

Dated this 13th day of May, 1948.

LEON R. YANKWICH

Judge

[Endorsed]: Filed May 13, 1948. Edmund L. Smith,
Clerk. [22]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on regularly for trial upon the issues raised by the Complaint, Answer and Counterclaim, and oral, documentary and physical evidence having been introduced, and the Court having fully considered the same together with the briefs of counsel, the Court makes the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT

1.

The plaintiff, Alva G. Blanchard, is the owner of United States Patents No. 2,233,395 issued May 4, 1941, hereinafter referred to as the '395 patent, and No. 2,199,611 issued May 7, 1940, hereinafter referred to as the '611 patent. The application for the '611 patent was a division of the application for the '395 patent, and [23] the filing date of the latter, to-wit, October 14, 1935, is therefore the effective filing date for each of said patents.

2.

No evidence except unsupported oral testimony of plaintiff was introduced to show invention of either of said patents prior to said effective filing date. ~~Said evidence was neither definite nor persuasive and~~ [LRY/J] Therefore, plaintiff is restricted to his said filing date of October 14, 1935 as the date of invention for each of said patents.

3.

The specification of the '395 patent defines the invention as an improvement in safety devices for boilers,

which, in view of the prior art must be limited to a safety device for boilers which produce automatic safety.

4.

The claims of the '395 patent all describe and must be specifically limited to the fuel valve assembly described in the specification and depicted in the drawings. Claims 2 and 3 are by their terms limited to "non-return means to prevent back-flow of fluid from said compartment." The only "non-return means disclosed or contemplated in said patent is the check valve 79 seen in Figure 6, and the claims are limited thereto. Claim 1, although it does not specifically recite the non-return means of claims 2 and 3, must, in view of the specification and prior art be considered to include said check valve 79 by reference. As so limited said claims are valid. ~~Unless so limited said claims are invalid.~~ [LRY/J]

5.

The automatic safety of the '395 patent apparatus is achieved [24] by the action of the check valve 79, which holds the fuel valve 75 closed until the relief valve 78 is manually opened. This function of the check valve can only be accomplished by placing it below the level of the liquid standing in compartment 72 and the inlet to said compartment, so that when the check valve closes, it will trap only liquid in said compartment. Thus when the check valve has been closed the fuel valve 75 is locked in closed position, and can only be opened by manually opening relief valve 78 to permit the springs 77 to force diaphragm 73 upwardly to expel liquid from compartment 72.

6.

Every element of the '395 claims is shown by the prior art patent to Parker No. 1,965,052 except the feature of locating the check valve 79 below the liquid level in the inlet means to compartment 72. The House Patent No. 521,166 shows each and every element of said claims except the check valve, i. e., the non-return means. [LRY/J]

7.

The element appearing in all of said '395 claims, "means for supplying fluid under pressure to said compartment" must be read in the light of the specification to include any conduit means such as pipe 25a shown in the Blanchard drawings, and hence finds its full equivalent in the prior art structures. There is nothing in the specification or file wrapper to indicate that this element should be limited to any particular means such as valves, floats or other mechanism. [LRY/J]

8.

The piston operated valves of the prior art patents to Parker, House, Horridge, Spiller and Ferrari are all the full equivalent of both the Blanchard diaphragm-operated valve, the [25] Pinkerton cup type piston valves, and the diaphragm-operated valves shown in the prior art patents to Williams, Fulton, Doble and Stanley. It is immaterial insofar as the Blanchard structure and claims are concerned, whether the diaphragm or equivalent piston structure, operates a fuel shut-off valve, a steam valve or a water valve. [LRY/J]

9.

Further with respect to the prior art patents it is found that:

- (a) The Parker patent shows apparatus which completely shuts off the fuel to the boilers by the closing of valve 34 and shows means, to wit, the weight 35, for yieldingly holding said valve open.
- (b) The Spiller patent shows a manual relief for the fluid pressure in the cylinder disclosed therein, in the orifice R to which a relief cock can be fastened. [LRY/J]

10.

The evidence shows conclusively that in late 1932 or early 1933 the defendant Pinkerton manufactured, and installed on a lease of the Continental Oil Company at Seal Beach, California, the boiler alarm and fuel valve control structures shown in Defendants' Exhibits E, E-1, E-2, F, F-1, F-2, F-3, F-4, and O. The details of said structures are shown by said exhibits and were fully identified through the testimony of defendant Pinkerton and of disinterested witnesses Brown, Thornton and Dolarheid, all of whom took part in said installation at Seal Beach, the manufacture of said apparatus being conclusively shown by disinterested witnesses Harvill, Beck and Robson. The testimony of all of said witnesses in all respects is found to be clear, satisfying and convincing beyond any reasonable doubt. The dates on the drawings illustrating Exhibits E and F are [26] found to have been fully proved.

11.

The accused devices manufactured by defendant Corporation are substantially the same as ~~if not identical~~

with, [LRY/J] the early devices manufactured by Pinkerton and installed in the said Continental Seal Beach lease in late 1932 or early 1933, and insofar as the claims of the Blanchard '395 patent are concerned, said devices are identical. Both the 1932-33 devices and the accused devices included in a safety apparatus for boilers, the combination of a fuel supply conduit, a valve in said conduit, means for yieldingly holding said valve open, a cylinder, a piston responsive to pressure in said cylinder arranged to close said valve, means for supplying fluid under pressure to said cylinder to force said fluid against the piston, and a manually operable valve to relieve the fluid pressure in said cylinder, said piston having a body of liquid thereon as a result of condensation of the steam in the inlet line. Neither of said devices employed or employs a check valve or any other device, structure or means which can respond to or be considered the equivalent of, the "non-return means" recited in claims 2 and 3 of said '395 patent.

12.

None of the claims of the '395 patent are or have been infringed by any device or apparatus made, used or sold by the defendants or either of them prior to the filing of the Complaint herein. If any of said claims is expanded sufficiently to be interpreted as infringed by any structure of the defendants, then said claim would by such construction be directly anticipated by and invalid over the prior art of record, and in particular the prior patents to Parker and House. [LRY/J] [27]

13.

The device of the '611 patent is intended for use in conjunction with the operation of valves and outlets for steam boilers, and aims to permit the valves to be opened

sequentially in case several steam outlets are used. Each of the claims in suit calls for and is limited to a single cross-pin operating a plurality of aligned needle valves, each with a slot in its valve stem, the slots being of different size and the valves being operated by a float lever. Each of the claims must be strictly limited to the precise structure illustrated in the patent, and as so limited is valid. but if not so limited is invalid. [LRY/J]

14.

All of the features and elements of the '611 claims in suit are shown in the prior art patents in evidence except the single feature of a single cross-pin extending through a plurality of different sized slots in aligned valve stems. [LRY/J]

15.

The prior art patents to Baldwin, Wright, Singleton and Humphrey anticipate each of the '611 claims in suit unless said claims are strictly limited to slots in the valve stems and a single cross-pin extending through said slots. Insofar as the claims of said patent are concerned, it is immaterial in a pin and slot linkage which element does the operating and which is operated, the interchangeability of these parts being conventional. [LRY/J]

16.

Both the Singleton and Wright patents show a plurality of outlet passages as these words are used in the '611 claims, and a plurality of valves. [LRY/J] [28]

17.

The accused devices of defendants do not have slots of different sizes in their valves, nor do they have a single pin extending through slots in the valves or their

valve stems. The defendants' structure uses separate pins located at two different places to operate two separate valves in a manner different from that disclosed or claimed in said '611 patent.

18.

The combination of the loose ring 52 pivotally connected to the valve shown in Exhibit D is not the equivalent of a valve stem and slot as shown or claimed by the '611 patent, nor is it the equivalent of such a valve and slot in two parts. The separate pins of the accused structures are not the equivalent of the cross-pin shown or claimed in the '611 patent. Said pins of defendants do not comprise and may not be considered to be the equivalent of a single pin in two parts.

19.

The means employed in the accused devices for achieving sequential operation of the valves therein are entirely dissimilar from those shown in the '611 patent, and consequently none of the '611 claims are or have been infringed by any devices made, used or sold by the defendants or either of them prior to the filing of the Complaint herein.

20.

Unless the claims in suit of the '611 patent are strictly construed as previously found they are invalid for lack of invention over the Pinkerton's 1932-33 structure shown in Exhibit F in view of the prior art patents and the Reliance Valve Exhibit A. [LRY/J] The accused devices are merely normal variations of the Reliance valve [29] and the early Pinkerton structure open to any member of the general public.

CONCLUSIONS OF LAW

1.

Claims 1, 2 and 3 of the Blanchard Patent No. 2,233,395 and claims 1, 2 and 5 of Blanchard Patent No. 2,199,611 are valid.

2.

None of the claims of either of said patents in suit is infringed by any structure or device made, used or sold by Defendants or either of them prior to the filing of the Complaint herein.

3.

The Complaint should be dismissed and the Counterclaim to the extent that it prays for invalidity of said patents should be dismissed.

4.

Defendants should be allowed their costs and disbursements herein but no attorneys fees.

Dated this 7th day of June, 1948.

LEON R. YANKWICH

United States District Judge

Approved as to form:

HAMER H. JAMIESON
Attorney for Plaintiff

[Endorsed]: Lodged May 28, 1948. Filed Jun 7, 1948.
Edmund L. Smith, Clerk. [30]

In the United States District Court
Southern District of California
Central Division

Civil No. 7734-Y

ALVA G. BLANCHARD,

Plaintiff,

vs.

J. L. PINKERTON, INC., et al.,

Defendants.

JUDGMENT

This cause having come on to be heard and evidence having been introduced and briefs filed, and the Court having considered the same and having made and entered its Findings of Fact and Conclusions of Law herein,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

1.

That plaintiff is the owner of United States Patents No. 2,233,395 and 2,199,611.

2.

That claims 1, 2 and 3 of Patent No. 2,233,395 and claims 1, 2 and 5 of Patent No. 2,199,611 are valid. [31]

3.

That none of the claims in suit of either of the above-mentioned patents is infringed by any device made, used

or sold by either of the defendants herein prior to the filing of the Complaint, and said Complaint is hereby dismissed. The Counterclaim filed by defendants insofar as it prays for a decree of invalidity of said patents is also dismissed. Defendants shall recover and have execution for their costs and disbursements herein in the amount of \$170.73.

Dated at Los Angeles, California, this 7th day of June, 1948.

LEON R. YANKWICH

United States District Judge

Approved as to form:

HAMER H. JAMIESON

Attorney for Plaintiff

Judgment entered Jun. 7, 1948. Docketed Jun. 7, 1948. C. O. Book 51, page 150. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Lodged May 28, 1948. Filed Jun. 7, 1948. Edmund L. Smith, Clerk. [32]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS UNDER RULE 73(b)

Notice is hereby given that Alva G. Blanchard, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from those parts of paragraph 3 of the Judgment entered in this action on June 7, 1948 which order, adjudge and decree that none of the claims in suit of either Patent No. 2,199,611 or Patent No. 2,233,395 is infringed by the accused devices like Plaintiff's Exhibit 12 herein, or by the accused devices shown in Plaintiff's Exhibit 11 herein, or by the accused devices shown on the right hand side of each of Plaintiff's Exhibits 8, 9 and 10 herein that were made, used or sold by either of the defendants herein prior to the filing of the complaint herein, and from those parts of paragraph 3 of the said Judgment entered in this action [33] on June 7, 1948 which order, adjudge and decree that the complaint herein is dismissed and that the defendants shall have execution for their costs and disbursements herein.

Dated July 7, 1948.

HAMER H. JAMIESON

Attorney for Appellant Alva G. Blanchard

Address: Security Building, Los Angeles 13,
California

[Endorsed]: Filed & mld. copy to R. W. Fulwider,
Atty. for Defs. Jul. 7, 1948. Edmund L. Smith,
Clerk. [34]

Bond No. 59573

The Premium charged for this
Bond is \$10.00 per annum

In the United States District Court in and for the
Southern District of California
Central Division
Civil No. 7734-Y

ALVA G. BLANCHARD,

Plaintiff,

vs.

J. L. PINKERTON, INC., a corporation, and
J. L. PINKERTON,

Defendants.

COST BOND ON APPEAL

Know All Men By These Presents:

That we, Alva G. Blanchard and National Automobile and Casualty Co., as surety, are held and firmly bound unto J. L. Pinkerton, Inc., a corporation and J. L. Pinkerton, defendants, in the above styled and numbered cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to them and their successors and assigns; to which payment well and truly be made we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns by these presents.

Executed and dated this 24th day of June, A. D., 1948. [35]

Whereas, the above named Alva G. Blanchard has prosecuted an appeal to the Honorable United States

Circuit Court of Appeals for the Ninth Circuit to reverse part of the judgment of the District Court for the Southern District of California, Central Division in the above entitled cause,

Now, Therefore, the condition of this obligation is such that if the above named Alva G. Blanchard shall prosecute his said appeal to effect and answer all costs if he fails to make good his plea, then this obligation shall be null and void; otherwise to remain in full force and effect.

(Seal) ALVA G. BLANCHARD
NATIONAL AUTOMOBILE AND
CASUALTY INSURANCE CO.

By Lloyd H. Johnston

Attorney in Fact

State of California, County of Los Angeles—ss.

On this 24th day of June, in the year 1948, before me, Loraine G. Winston, a Notary Public in and for said County and States, personally appeared Lloyd H. Johnston, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Automobile and Casualty Insurance Co., and acknowledged to me that he subscribed the name of the National Automobile and Casualty Insurance Co., thereto as surety, and his own name as Attorney-in-Fact.

(Seal) LORAIN G. WINSTON

Notary Public in and for Said County and State

My Commission Expires July 4, 1949

The foregoing bond is approved this 25th day of July, 1948.

LEON R. YANKWICH

District Judge [36]

[Verified.]

[Endorsed]: Filed Jul. 7, 1948. Edmund L. Smith,
Clerk. [37]

[Title of District Court and Cause]

ORDER UNDER RULE 75(i)

Good Cause Appearing Therefor, it is hereby ordered that, pursuant to Federal Rule of Civil Procedure Number 75(i) all of the original papers and exhibits specified by the parties in the appeal in the above case shall be sent to the Circuit Court of Appeals for the Ninth Circuit in lieu of copies, by the Clerk of this Court and shall be returned to the Clerk of this Court by the Clerk of said Appellate Court after the appeal herein is heard.

Dated at Los Angeles, California, this 12th day of July, 1948.

PAUL J. McCORMICK

U. S. District Judge

[Endorsed]: Filed Jul. 12, 1948. Edmund L. Smith,
Clerk. [45]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 47, inclusive, contain full, true and correct copies of Complaint; Answer; Stipulation and Order that Plaintiff May File Reply to Counter-Claim in Answer; Reply; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Cost Bond on Appeal; Statement of Points Under Rule 75(d); Praeceptum for Transcript of Record; Order Under Rule 75(i) and Counter-Designation of Record on Appeal which, together with copy of Reporter's Transcript of Proceedings on April 1, 2 and 5, 1948 and the original exhibits defendants' A to O, inclusive and plaintiff's 1 to 13, inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 26 day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Leon R. Yankwich, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Thursday, April 1, 1948

Appearances:

For the Plaintiff: Hamer H. Jamieson, Esq.

For the Defendants: Robert W. Fulwider, and William C. Babcock, by Robert W. Fulwider, Esq. [1*]

* * * * *

The Court: Go ahead.

Mr. Jamieson: With regard to the stipulations, it is stipulated by the plaintiff, and I understand by the defendant, that the plaintiff has title to and owns all rights under both patents in suit, Nos. 2,199,611 and 2,233,395. [11] Is that right?

Mr. Fulwider: We so stipulated.

Mr. Jamieson: Secondly, it is stipulated that the sketches of the defendants' devices illustrate valve operating devices and safety apparatus that were made and sold by the defendant corporation herein within the Southern District of California, Central Division, and elsewhere, before the complaint was filed: subject to the correction of any inaccuracies that may later be shown to exist.

Mr. Fulwider: Pardon me. Would you state that again?

Mr. Jamieson: If you want me to, yes. The sketches of the defendants' devices, those are the ones shown in

*Page number appearing in original Reporter's Transcript.

the enlargement on the board, which we are going to use in evidence and copies of which have been furnished to you,—

Mr. Fulwider: Yes.

Mr. Jamieson: —illustrate valve operating devices and safety apparatus that were made and sold by the defendant corporation herein within the Southern District of California, Central Division, and elsewhere, before the complaint herein was filed, subject to the correction of any inaccuracies that may be later shown to exist. Is it so stipulated?

Mr. Fulwider: So stipulated.

Mr. Jamieson: Third, it is stipulated that plain, uncertified Patent Office copies of the patents in suit and [12] prior art patents may be introduced in evidence with the same force and effect as the originals or certified copies thereof, subject to the correction of any inaccuracies that may be shown to exist at any time.

Mr. Fulwider: So stipulated.

Mr. Jamieson: Fourth, it is stipulated that claims 1, 2 and 5 of patent No. 2,199,611 are in issue, and we have withdrawn claims 3 and 4, in accordance with the letter I sent to you, to the attorney for the defendants, in order to simplify and narrow the issues in the case, and I am just making that statement for the record. I don't believe any formal paper was filed, but simply a letter to you. [13]

* * * * *

ALVA G. BLANCHARD,

the plaintiff herein, called as a witness in his own behalf,
having been first duly sworn, testified as follows:

Direct Examination

The Clerk: What is your name, please?

The Witness: Alva G. Blanchard.

The Clerk: That is A-l-v-a, is it not?

The Witness: Yes. [14]

Mr. Jamieson: Has your Honor any preference as to
where I stand?

The Court: No, except that I don't want you to stand
too close to him.

Mr. Jamieson: We are going to use these charts here.

The Court: Yes. It is much better to stand away
from the witness unless you are showing him documents.
By Mr. Jamieson:

Q. Will you please state your name?

A. Alva G. Blanchard.

Q. How old are you? A. Forty-nine.

Q. Where do you reside?

A. Shreveport, Louisiana.

Mr. Fulwider: Could I ask you to speak up just a little
bit, Mr. Blanchard? I can't hear you.

The Witness: Yes.

Q. By Mr. Jamieson: Are you the plaintiff in this
case, Blanchard v. Pinkerton, No. 7734-Y, Civil?

A. I am.

Q. Are you the inventor of the patents in suit, Nos.
2,233,395 and 2,199,611? A. Yes.

Mr. Jamieson: I will offer in evidence as Plain-
tiff's Exhibit 1 a copy of the first patent, No. 2,233,395,

(Testimony of Alva G. Blanchard)

and for [15] the court's convenience, I have a copy for the court.

The Clerk: So admitted, your Honor?

The Court: Yes. It may be received and a paper copy may be used instead of the official copy.

The Clerk: Plaintiff's Exhibit 1. No. 2,233,395 is Plaintiff's Exhibit 1 in evidence.

(The document referred to was marked Plaintiff's Exhibit 1, and was received in evidence.)

Mr. Jamieson: I offer in evidence as Plaintiff's Exhibit No. 2 the second patent in suit, No. 2,199,611, and I offer a plain uncertified copy in evidence, and a copy for the court's convenience.

The Clerk: Admitted, your Honor?

The Court: So admitted, yes.

Th Clerk: Plaintiff's Exhibit 2 in evidence.

(The document referred to was marked Plaintiff's Exhibit 2, and was received in evidence.)

Q. By Mr. Jamieson: You are the owner of these patents and all rights under them? A. Yes.

Q. Have you ever manufactured any device embodying the inventions as shown and claimed in these patents?

A. Yes, sir.

Q. Under what name did you manufacture these devices?

A. In the name of the Inferno Company. [16]

Q. Have you any partners in that company?

A. I do not.

(Testimony of Alva G. Blanchard)

Q. Is that just a fictitious name for your operations?

A. Yes, it is.

Q. Have you a catalogue showing the devices manufactured by you under the patents in suit?

A. Yes, I do.

Q. Will you identify that catalogue and the parts that show the patents in suit?

A. Yes. This is our catalogue and Bulletin No. 15, which shows a copy—or, shows articles that are covered by the patents.

Q. Is that the one that has the green binding?

A. Yes, it is.

Mr. Jamieson: I offer that in evidence as Plaintiff's Exhibit No. 3.

The Clerk: So admitted, your Honor?

The Court: Yes.

The Clerk: No. 3 in evidence.

(The catalogue referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

Q. By Mr. Jamieson: Have you one of the valves manufactured by you under the patent in suit?

A. Yes. This is a triple valve that is covered in our patent. [17]

Mr. Jamieson: I offer that in evidence as Plaintiff's Exhibit No. 4.

The Clerk: Is this admitted, too, your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 4, in evidence.

(The valve referred to was marked Plaintiff's Exhibit 4, and was received in evidence.)

(Testimony of Alva G. Blanchard)

Q. By Mr. Jamieson: Have you a double valve?

A. Yes, we make them in a double valve, and this is a sample of it.

Mr. Jamieson: I offer this in evidence as Plaintiff's Exhibit 5.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(The double valve referred to was marked Plaintiff's Exhibit 5, and was received in evidence.)

Q. By Mr. Jamieson: How did you come to invent the patents in suit? Will you tell us the story?

A. I manufactured alarms for a number of years and the alarms were pretty good, but I noticed a few customers began to take the alarms off because they said the firemen wouldn't pay attention to the whistle and would continue whatever they were doing, and the water in the boiler would get low anyway, even with the whistle blowing. So I contacted all the manufacturers of alarms other than myself at that [18] time, and tried to find some concern that would make an automatic fuel shutoff valve that would operate in connection with the alarms. Well, there was none on the market at that time, and—

Q. Did you make any other investigation?

A. Well, in the fields, of course. There was nothing of that kind in use and nothing on the market, so I began experimenting for a means to accomplish this, and I finally accomplished it in '33. Then I think I sold my first complete unit in 1934, and during the next year I applied for a patent on the entire device.

(Testimony of Alva G. Blanchard)

Q. What were some of the troubles that you encountered that caused you to make the invention of the patents in suit?

A. Well, a great many customers were even taking the alarms off alone.

Q. Why?

A. Because the firemen would hear the whistle blow and they would think they had so much time before they would actually have a dangerous condition, and they would continue doing whatever they were doing, and oftentimes they were busy longer than they thought they would be, and the water would continue falling until it got to the dangerous point.

Q. What happened when it got to the dangerous point?

A. Well, when it got to the dangerous point they either had to shut the boiler down completely, or the fireman [19] would take a chance on putting the water in the boiler, and I know in at least one instance the fireman took that chance of putting the water in the boiler and blew it up.

Q. When these boilers blew up, were there different types of explosions? A. Yes, there were.

Q. Have you any pictures that illustrate these different types?

A. Yes, I have. I have here a picture of a boiler explosion at Talco, which was caused by the water getting too low in the boiler and staying that way for some time. When this condition exists the crown sheet gets so hot that the stay bolts push through it and it causes an explosion in which the boiler goes straight up.

(Testimony of Alva G. Blanchard)

Q. Do these two pictures illustrate that type of explosion? A. Yes.

Mr. Jamieson: I would like to offer these illustrations in evidence as Plaintiff's Exhibit 6 and 6-A.

The Clerk: Which is 6?

Mr. Jamieson: This is 6.

The Clerk: Plaintiff's Exhibits 6 and 6A.

(The photographs referred to were marked Plaintiff's Exhibits 6 and 6-A, and received in evidence.) [20]

Q. By Mr. Jamieson: Have you any pictures that illustrate the other type of explosion?

A. The other type of explosion is caused by the water getting low and exposing the crown sheet, but not long enough to reduce it to a soft condition, so that the stay bolts will stay there while it reaches this condition, and the fireman will start the water and boiler and flood the crown sheet. When this occurs steam is generated so fast that the safety valves can't take care of it, and a tremendous pressure is put on the boiler inside and blows it all to pieces.

Q. Do these photographs illustrate that type of explosion? A. Yes, they do.

Mr. Jamieson: I would like to ask they be received in evidence as Plaintiff's Exhibits 7, 7-A and 7-B.

The Court: All right.

The Clerk: Plaintiff's Exhibits 7, 7-A and 7-B in evidence.

(The photographs referred to were marked Plaintiff's Exhibits 7, 7-A and 7-B, and were received in evidence.)

(Testimony of Alva G. Blanchard)

Q. By Mr. Jamieson: Are these explosions very severe?

A. Yes, they are very serious, and I would estimate in 50 per cent of the explosions life is lost or serious injury results. [21]

Q. Were there very many of these explosions occurring before you made your inventions of the patents in suit?

A. Well, I haven't seen any notices of explosions in some time, but, as well as I remember, when we first began experimenting on this device we read of an explosion in the oil fields at least every two or three weeks; oftentimes every week.

Q. After you introduced your device, were there any explosions of any of the boilers on which your device, covered by the patents in suit, were installed?

A. Not on our—not in the boilers on which we installed our equipment. But, of course, there were still many explosions, but we noticed though that the rate of explosions was decreasing as our sales of this equipment increased.

Q. Did any of the boilers on which your device was installed explode?

A. I had one report of a boiler explosion where the customer owned our equipment, and we immediately investigated it, and the customer advised me that his mud pit had broken into the feed water pit, and he had his boiler half full of mud. He continued using our equipment after he cleaned it out. No life was lost in that instance.

Q. Did he use your equipment after that?

A. Yes.

(Testimony of Alva G. Blanchard)

Q. Do you know of any other instance [22]

A. I know of no other instances.

Q. Where boilers have blown up with your equipment on them? A. That's right.

Mr. Jamieson: Now, we have prepared enlargements of the patents in suit and drawings of the defendants' apparatus, and I would like to have you come down and take a pointer and refer to these enlargements and explain to the court your invention.

Before you do so, however, I would like to ask that this first enlargement be marked Plaintiff's Exhibit 8 and the second one Plaintiff's Exhibit 9.

The Clerk: These will be marked for identification?

Mr. Jamieson: Yes. Unless you want to stipulate that they go in?

Mr. Fulwider: Let's mark them for identification.

Mr. Jamieson: They will be marked for identification.

The Clerk: This will be Plaintiff's Exhibit 8, for identification.

(The enlarged chart referred to was marked Plaintiff's Exhibit 8, for identification.)

Mr. Jamieson: The second one will be Plaintiff's Exhibit 9 for identification.

The Clerk: Plaintiff's Exhibit 8 for identification. [23]

(The enlarged chart referred to was marked Plaintiff's Exhibit 9, for identification.)

Mr. Jamieson: And this one Plaintiff's Exhibit 10, for identification.

The Clerk: Plaintiff's Exhibit 10, for identification.

(The enlarged chart referred to was marked Plaintiff's Exhibit 10, for identification.)

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Mr. Jamieson: Would your Honor like to come down near here? Or I have some extra copies.

The Court: No, that is all right. That will be fine.

Mr. Jamieson: For your convenience, I have prints of that if you would like them.

The Court: All right.

Mr. Fulwider: Will you put the numbers on them?

Mr. Jamieson: All right.

Mr. Fulwider: Which is which?

Mr. Jamieson: Do you have copies?

Mr. Fulwider: Yes, I have copies of 8, 9 and 10.

Q. By Mr. Jamieson: Now, I will ask you to refer to these exhibits, Nos. 8, 9 and 10 and explain to the court the construction and mode of operation of your invention shown on the left side of Exhibit 8.

A. The drawing on the left side of Exhibit 8 is a general view of the complete apparatus in my patent 2,233,395. At 70 there is a boiler. 100 shows an alarm body, the [24] mechanism of which is shown in another figure. The alarm body is connected by pipes 101 and 102 to the top of the boiler and side of the boiler, respectively. The alarm is set at a height that will reflect the condition, the level of the water within the boiler. Figure 40 or numeral 40 shows a feed water valve that is connected to the feed water valve 40a leading to the boiler, and the top of feed water valve 40 is connected to the alarm body by a pipe 15a. The feed water valve 20 is mounted in a feed water line 20a, leading beneath the boiler to the burners. The top of the feed water valve 20 is connected by line 25a to

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the valve assembly. Within the alarm 26 is a whistle which sounds an alarm when the water within the float is at a certain level.

On turning to Exhibit 9 I show in the lower left-hand corner a cross-sectional view of my fuel shutoff valve, as illustrated by the numeral 20 of Figure 1 of the preceding exhibit. This cross-sectional view is taken across the fuel line leading to the boiler.

Figure 1 of 2,199,611 shows the control mechanism for operating the fuel cutoff valve, as it was originally designed. In the operation the power to operate this device came from the pipe 11 down through this opening 25 into the upper part of the fuel cutoff valve. In operation in Figure 1 of 2,199,611 the water level is shown by this dotted line, and the float 33 is suspended in this water, and the water level [25] rising and falling raises and lowers the float 22 and, in turn, the arm 20 is raised and lowered as it is connected by the beam 34 to the float. When the water level drops in the boiler to a certain point, the arm 20 moves on the pin 24 as a fulcrum point and pulls the valve by moving the pin 25 against the back of the valve until it is in an open position. Then the steam above the water level and the alarm passes through this valve which comes down through this pipe and exerts a pressure on the float, the chamber 71. That pressure on the float forces the float through the valve 80 and 79 into the chamber 72. Here that pressure is exerted on a diaphragm 75—or, correction, 73. This pressure on the diaphragm forces the piston down against the spring 77, and through the stem 74 to the valve 75, until the valve 75 comes in contact with the seat 76, at which time the fuel supply to the boiler is cut off. When

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the fire is cut off then the operator, of course, ascertains what his trouble was, and when he has fixed it and is ready for his fire to come on again, he comes to this point here and opens—

Q. This “point here” does not show in the record.

A. He comes to the manual release 78 on the fuel cut-off valve and opens it, and allows this pressure to exhaust out of that opening, at which time—

Q. At what opening?[26]

A. Out of the opening 78a, at which time the valve is opened up.

Now, originally my non-return means was in this valve, because when the fire was cut off the fireman would immediately bring his water back up to the right level.

Q. When you say “this valve,” the record does not show which one you are referring to.

A. In Figure 1 of patent 2,199,611. As the float was raised, float 33 was raised, the arm 20 was moved in an upward position until the pin 25 forced the valve back against its seat, at which time the water that had condensed in this line was retained in the fuel cutoff valve to hold it in a closed position. In experimenting with the device I found that oftentimes the valve held by pin 25 against its seat would leak before there was any low water. This condition caused the pressure to build up in this line and on the fuel cutoff valve and cut the fire off prematurely, that is, when it wasn't necessary and there was plenty of water in the boiler. To overcome this defect which existed perhaps in 10 or 15 per cent of the cases we put a bleed opening in our line, which is indicated in patent 2,233,395 at 48a. This would permit any small amount of steam to escape that was just leaking by the

(Testimony of Alva G. Blanchard)

valve, but when the valve was pulled from its seat by low water, the greater volume of steam passing through this opening would not [27] exist through 48a, and the pressure then would build up on the fuel cutoff valve and operate it. At that time we introduced a second non-return means in our fuel cutoff valve to retain this fluid below, so that the bleed opening 48a could be opened at all times.

Q. What is the number of this second non-return means?

A. The second non-return means and preferred non-return means that we use is valve 79 seated against seat 80 of patent 2,233,395.

Q. Now, will you explain the way that your valve operated, and I will put Exhibit 10 on the board to assist you.

A. In my patent 2,199,611 Figure 1 shows a partial cross-section of the housing which is indicated in my previous Figure 1 of this patent 2,233,395. 1 indicates a housing, and the dotted line to the right indicates the water level within the housing. At 2 I have an opening, which is made in the form of a sleeve 3, and this sleeve is welded into the housing at 4. At 6 I have a plug which is retained in this opening in the sleeve by threads at 5. Through this opening I have a plurality of passages, one of which is indicated by the pipe 11. In these passages I have valve seats and valves with various length slots in their stems. These valves are held onto their seats by pin 25, and this pin 25 is carried by float arm 20, which is [28] fulcrumed on a lug extending from the plug by pin 24.

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On the right the float arm is raised and lowered by float 33, which is attached to a float arm 20 by a suitable pin 34.

This Figure 1 is a vertical cross-section through the center valve of the device. Now, Figure 2 represents a horizontal view through all of the valves and with just part of the float rod showing. Figure 6 shows the plug, and 3 is a sleeve in the housing 1. 7, 8 and 9 are passages through the plug 6. Into each one of these openings there is a seat 13, which are all alike. Against these seats I have valves 14, 15 and 16. They have stems on them and through these stems there are openings to receive a pin 18. The first valve loosely fits this pin 18, so that when the float arm 20 falls with the lowering of the float, the first valve is pulled from its seat.

Q. What is the number of the first valve?

A. The first valve 16 is pulled from its seat. When this first valve is pulled from its seat the steam which is on the inside of the housing passes through the valve 16 and seat 13 through the opening 9 and pipe 12 to a suitable feed water valve, as shown in Figure 1 of my drawing in 2,233,395.

Q. At what number?

A. At 40. When this valve opens, that is, the feed [29] water valve 40 opens, it is normally closed, this pressure then opens this feed water valve, which allows water to go into the boiler, and when the water level in the boiler is raised again, it also is raised in this housing, and the float 33 is raised and the arm 20 and the valve 16 is again seated on its seat 13. At this time the feed water valve 40 is closed, and no further water will go into the boiler. But if the water level

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continues to fall in the boiler instead of passing through the feed water valve to the boiler by a failure of the water supply, the float will drop another predetermined amount until the back end of the valve 15 comes in contact with the back end of the slot in valve 15. This clearance is indicated by the numeral 21, pointing to the back end of this valve. When this valve is opened then by the pin 18 coming in contact with the back end of valve 15, the second valve is pulled off from its seat and the steam passing between valve 15 and seat 13 passes through the opening gate and through the pipe 11 to a suitable alarm whistle. When the alarm—

Q. What is the number of that alarm whistle?

A. The alarm whistle is indicated by the numeral 26 in my Figure 1 drawing of patent 2,233,295.

If the engineer or fireman or attendant is not present to hear the whistle and allows the water level to continue to drop, it will fall another predetermined distance, [30] depending on the length of the slot in the valve stem, until the back end of the slot in valve 14 comes in contact with the pin 18, at which time that valve is pulled from its seat.

Q. What is the number of that slot?

A. The clearance between the stem and the pin 18 is indicated by the numeral 22 in this figure. When this condition arises the steam will then pass between the valve 14 and the seat 13 and come through the opening 7 and the pipe 10 to the fuel cutoff valve, and it is connected into the pipe 25a on Figure 6 of 2,233,395. And then, of course, the fuel control or fuel cutoff valve operates as I have previously explained.

(Testimony of Alva G. Blanchard)

Q. Now, are you familiar with the construction and the mode of operation of the defendants' valve device that is the subject of this suit? A. I am.

Q. Is that shown in the right-hand side of these drawings, Exhibits 8, 9 and 10?

A. It is.

Q. Using these exhibits 8, 9 and 10, will you explain the construction and mode of operation of the defendant Pinkerton's device that is charged to infringe the patents in suit herein?

A. Well, the Pinkerton device does not utilize my [31] feed water control device, and his boiler is indicated at 70. His alarm is indicated at 100.

Q. Which exhibit are you talking about now?

A. Figure 1 of the Pinkerton apparatus or boiler.

Q. Is that Exhibit 8?

A. Which is Exhibit 8. As I said, the alarm of Pinkerton 100 is connected to the boiler 70 by the upper pipe 101 and the lower pipe at 102. He employs a whistle 26, and his fuel cutoff valve 20, which is connected to the alarm valve assembly by a pipe 25a. Through the fuel cutoff valve 20a the fuel passes through the fuel cutoff valve and thence on to the center of the boiler and up to the burners.

In operation the Pinkerton device illustrated in Figure 3 of Exhibit 9 is shown by a float 100 and a sleeve welded into this float, and there are no numbers shown at this point.

Q. Is 100 the float?

A. 100 is a housing around the water within the alarm body.

(Testimony of Alva G. Blanchard)

Q. What is the number of the float?

A. The float is indicated at 3, which is attached to an arm by a suitable means, and the arm is No. 4. The arm 4 is fulcrumed about a pin 4a, and raises and lowers according to the level of the water and seats and unseats the valve shown in the seat 15 by the pin or pins 9. As the [32] float lowers the steam passes through the opening between the seat and the valve, and this illustration shows the valve cut through the near side, whereas in operation the steam comes through the valve immediately behind this, through the opening 25a and thence on down to the fuel cutoff valve, and into the fuel cutoff valve at 25a.

Q. Have you indicated those connections by pencil marks on this Exhibit 9?

A. I have. I have just drawn a line from the connection 25a to the point it goes into in the Pinkerton fuel cutoff valve.

Q. And the same on yours on the other side?

A. And I have indicated it the same on my structure. As this pressure comes down this line it builds up a pressure in the chamber 72 of the Pinkerton device and exerts this pressure on a leather cup, which I consider the equivalent of my diaphragm structure, as it is leak-proof, the same as my diaphragm structure. This pressure exerted on the leather cup 73 is transmitted to the valve stem 74, and the pressure overcomes the spring 77 and eventually presses the valve 75 down against its seat 76, at which time the flow of the fuel through the valve is cut off.

Now, when the water level rises in Pinkerton's device his valve is seated again, and all of the fluid that is in

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this line is entrapped at the head of the Pinkerton device [33] and holds the cutoff. Then when the fireman in the Pinkerton device has his water trouble corrected, he opens the valve 78 by pressing it and the fluid pressure escapes through the opening 78a and the spring 77 raises the valve and piston and stem up and opens the fuel passage through the valve.

Now, Pinkerton's device operates satisfactorily for about 75 per cent of the time, the same as my original structure did, as he has only my original non-return means, as shown in the valve assembly in the alarm body, and he doesn't have the other part of it and the result is that oftentimes the leakage of this valve will—

Q. "This valve" doesn't show in the record.

A. The leakage of the valve in seat 15 will cause the pressure to build up on his cylinder head and the fire will be cut off. I have personally seen in a number of cases where the fireman had locked this valve open so that the pressure could not possibly cut the fuel off, because it built up accidentally on account of this leakage which hasn't yet been provided for.

Q. Now, will you refer to the valve mechanism shown in the figure on the right of Exhibit 10 and explain the construction of the Pinkerton valve in that connection?

A. In Figure 1 on the right of Exhibit 10, showing the Pinkerton valve operating structure, a float housing is indicated at 1. There is an opening 2, into which there is a [34] sleeve 3 welded. There is a plug 6, which is fastened into the sleeve by the threads 5.

Figure 1 is a vertical cross-section through the center of the opening 8 illustrated in Figure 2 below. The float 33 of Pinkerton's device floats in the water within the

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alarm housing, and is connected by a pin 34 to the float arm 20. The float arm 20 is fulcrumed by a lug on the plug within the housing at a point indicated at 24. The upper part of the drawing shows a pin 25 through the stem of the valve. This valve is seated in a seat, the number of which is not shown, but the seat is within the opening 8, and the opening 8 leads to a pipe 11, to which a whistle 17 is attached.

The lower illustration, Figure 2, shows a horizontal cross-section through both valves. The housing is indicated by the numeral 1 and there is a sleeve 3 welded into the housing. There is a plug with openings 8 and 9 screwed into this sleeve. Into these openings 8 and 9 there are two seats 13. In these two seats 13 there are valves 15 and 16. Attached to the end of valve 15 is a lever 20. In this lever 20 there is a pin 25, and a pin 25 above, in two pieces. This pin in the first valve seats the first valve first. In the second valve, on an elevation of the water level, the pin 25 comes in contact with the end of the slot in valve No. 16. [35]

Q. What is the number of that slot?

A. The number of the slot is 21, and this valve 16 is made in two pieces, and the pin 25 is made in two pieces.

Q. Do his pin and slot perform the same purpose as you have made in one process?

A. Yes. This pin and slot in two pieces perform the same function and work exactly like a 1-piece structure of pin and valve.

Q. Now, I will ask you to compare the structure shown and described and claimed in your patents with

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the Pinkerton structure, using these same exhibits, Nos. 8, 9 and 10.

A. On Exhibit 8 on the left-hand side I show one of the drawings of Figure 1 of my patent, and on the right I show Pinkerton's hooked up in the same way. Pinkerton has a boiler 70, the same as the boiler 70 in my structure. His alarm 100 is the same as the alarm 100 in my structure. It is attached to the boiler in the same way by pipes 101 above and 102 below. In Pinkerton's structure he does not use my feed water valve, but he does use—

Q. What is the number of that?

A. That is 40 in my drawing but he uses my fuel cutoff valve 20 in his structure and 20 in my structure. The fuel passes through my feed water valve 20 through the line 20a, thence to the boiler.

Q. Is that feed water valve 20? [36]

A. My fuel cutoff valve 20.

Q. And the fuel line?

A. And the fuel line 20a, thence to the boiler.

In Pinkerton's device I have indicated 20a for the fuel line through the fuel cutoff valve, thence to the boiler.

The fuel cutoff valve in my structure is indicated by the numeral 25a, and in Pinkerton's structure it is the same.

Q. Continue with this exhibit.

A. Now, in Exhibit 9, Figure 3 of the Pinkerton apparatus 100 indicates the housing surrounding the water within the alarm body. It is the same in Pinkerton's structure as it is in my structure. The opening within the housing—

(Testimony of Alva G. Blanchard)

Q. Will you compare Figure 3 of Pinkerton with Figure 1 of your patent 2,199,611 first, and then with the other?

A. In Figure 3 of the Pinkerton structure the housing is indicated by 100, and in Figure 1 of my patent 2,199,611 the housing is 1. There is an opening within this housing 2 in my structure which is not numbered in Pinkerton's structure.

Q. Is it present there?

A. It is present at the same time and can be easily distinguished.

I have a sleeve 3, which is welded into the housing, and [37] it is also the same in Pinkerton's structure, although it is not numbered. I have a plug 6 in my housing closing this opening which is indicated by the numeral 8, which is Pinkerton's plug closing his opening within the housing.

Then Figure 1 is best compared with Figure 3 of patent 2,233,395 for a vertical cross-section. The float of Pinkerton's 3 is the same as my float 3 in Figure 3. The arm 4 in Pinkerton's is the same as the arm 4 in my structure. The valve stems 9 in Pinkerton's structure are the same as my single valve stem 9. The fulcrum point 4a in Pinkerton's structure is the same as the fulcrum point 4a in my structure. In Pinkerton's structure he cuts the pin in two, or uses a pin of two pieces and a valve stem of two pieces to accomplish the same result that I do with one pin through the shaft of all the valves.

Q. Now, will you compare your fuel cutoff valve with his?

A. Now, in Figure 2 which shows Pinkerton's safety fuel cutoff valve the opening which furnishes the pressure

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to operate the valve leading into it 25a is the same as in my structure. The chamber 72 of Pinkerton is the same as the chamber 71 in my structure, and 72 below. The leather cup 73 of Pinkerton's is the same or an equivalent structure to my diaphragm 73; that is to say, it is leak-proof and accomplishes the same result. The spring that normally [38] holds the valve open in Pinkerton's structure 77 is the same as the springs that I use in my structure 77. The valve stem in Pinkerton's structure indicated by the numeral 74 is the same as 74 in my structure. The valve 75 attached to the valve stem of Pinkerton's is the same as my valve 75 attached to the stem of my valve. The seat 76 of Pinkerton is the same as the seat 76 in my structure.

Q. Are these the same views of yours and his, or are they at different cross-sections?

A. No, Pinkerton's view is taken lengthwise, with the valve that is running, and the cross-section of my valve is taken across the pipe.

Q. Would you say that his is at right angles to yours, and vice versa?

A. Yes, his valve is at right angles to the cross-section I show. Pinkerton uses a manual release 78, which opens an opening 78a, the same as my manual release 78, which opens an opening 78a.

Now, I have a non-return means 80 and 79, which is a valve and seat, which is my preferred non-return means for retaining my fuel valve in a closed position, but I have a primary non-return means, which is in my valve assembly as shown in Figure 1 of 2,199,611, which is the action of the float in holding the valve seat on its seat, which is the same structure that Pinkerton uses in Fig-

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ure 3, to hold the [39] pressure within his fuel cutoff valve.

Q. Now, will you conclude your answer to this question by describing the structures shown in Plaintiff's Exhibit 10?

A. In this exhibit Figure 1 on the right represents a vertical cross-section of Pinkerton's structure, and Figure 2 represents a horizontal view of Pinkerton's structure through these valves. In Figure 1 on the left-hand side is a vertical cross-section of the valve structure in patent 2,199,611, and Figure 2 is a horizontal view for comparison. In Figure 1 of Pinkerton's his housing 1 is the same as my housing 1. His opening within the housing 2 is the same as the opening I give my housing 2. He has a sleeve 3 in his housing, the same as I have a sleeve. To close the sleeve he has a plug 6, which is the same as my plug 6. Through his plug he has multiple openings indicated in Figure 2 by 8 and 9, the same as I have, 7, 8 and 9 in Figure 2.

Looking at the lower Figure 2 of Pinkerton's structure, his float arm 20 is the same as the float arm 20 of my structure. On a raising and falling of the float 33 in Figure 1 of Pinkerton's, which is the same as in Figure 1 of my structure, the float arm is raised and lowered to seat the valves 15 and 16 of his structure, the same as valves 14, 15 and 16 are seated and withdrawn from their seat in Figure 2 of my structure. [40]

Valve openings 8 and 9 of Pinkerton's Figure 2 structure are the same as openings 7, 8 and 9 in my structure. And the pipes 11 and 12 leading into these openings are the same as the pipes 11 and 12 in my structure. Into the opening of Pinkerton's structure he has valve seats

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13, which are the same as valve seats 13 in my structure. He has valves 15 and 16 in his structure, which are the same as valves 15 and 16 in my structure. In valve 15 of his structure the pin 25 fits closely so that on a lowering of the arm 20 the valve 15 is pulled off from its seat immediately. Ordinarily steam would pass through this opening, through the opening 8 and pipe 11 to a whistle. On a continued lowering of the float arm 20, there is a pin 25 through an extension on his valve 16, and this pin 25 on striking the lower part of the opening 21 in the extension to his valve 16, the second valve is pulled from its seat, the same as I accomplish with one pin and one-part valve in 15. The opening in the valve stem of my valve 21 does exactly the same thing that Pinkerton's does.

Now, I believe that concludes the comparison.

Q. Now, I hand you the memorandum filed by me in this case and ask you to point out the elements shown on page 3 thereof in your structure and in the Pinkerton structure.

A. Well, in Pinkerton's structure the housing is indicated at 1. In my structure it is indicated at 1. [41]

Q. Which Exhibit number are you talking about now?

A. Exhibit No. 10, Figure 1. A housing having an opening is indicated by the housing 1 and the opening into which this plug screws in Pinkerton 6, and retained in the opening by the threads 5. In my structure I use the plug 6 screwed into the opening which is threaded and is indicated by the numeral 5.

(Testimony of Alva G. Blanchard)

Q. Please refer to your structure first and then to his in the next comparison.

A. Yes. A plurality of outlet passages through said housing is indicated in Figure 2 of my drawing in 2,199,611 by the openings 7, 8 and 9. A plurality of outlet passages through said housing in the Pinkerton structure is indicated by the openings 8 and 9 of Figure 2 of the Pinkerton structure.

A plurality of outlet passages through said plug are indicated by the openings or the pipes 10, 11 and 12 in Figure 2 of my structure and by the pipes 11 and 12 of Pinkerton's Figure 2 structure.

A plug in said opening is indicated in my structure by the plug 6, and in Pinkerton's structure by the plug 6 of Figure 1.

A plug adapted to close a fluid outlet; a valve in each of said passages; said valves having slots—

Q. Let's take those one at a time, please. [42]

A. Oh, yes. I am rushing here. A plug adapted to close a fluid outlet, in my structure that is the plug 6, adapted to close the opening in the sleeve, which is done by the means of threads 5, in Figure 1 of patent 2,199,611. In Pinkerton's structure the plug is retained in the opening by the threads 5 in exactly the same way.

A valve in each of said passages is indicated by the valves 14, 15 and 16 of Figure 2 of my patent 2,199,611. In Pinkerton's structure the valves are indicated at 15 and 16 in Figure 2.

The next element is said valves having slots of varying lengths in one end to determine the order in which they are opened.

(Testimony of Alva G. Blanchard)

The Court: Which claim are you reading from? I lost track there. They are all alike.

The Witness: Well, I was reading all of the elements separately. Now, for instance, the claim 1 reads: A housing, a plurality of outlet passages through said housing,—

The Court: I think that is confusing because the infringement alleged is of specific claims,—

The Witness: In one claim.

The Court: —so you ought to tell me when it reads on one, and not bunch them all together. You didn't get a homogeneous claim of that kind. Does this infringe 3?

The Witness: Yes. [43]

The Court: Then take the one that is most comprehensive and then compare it. You can't read everything you have in the specifications and show a comparison because you didn't claim everything in the specifications.

The Witness: Suppose I just take claim 1.

The Court: You don't know, but Mr. Jamieson knows that the only thing infringed in patents is the claim, and not the descriptive materials. They cannot be infringed.

Mr. Jamieson: Yes, your Honor. May I explain?

The Court: That is the trouble with having the inventor do it. As I have always said, he is sold on his art, and he bunches them all together. He is a partisan. The thing needs explanation, I know. You ought to have a scientist here to examine that and to do that. The plaintiff himself is a partisan. I wanted to check them here and couldn't find anything he was reading.

Mr. Jamieson: If your Honor please, I filed a memorandum which has a chart of the claims.

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The Court: That doesn't mean anything. What I want and all I want is somebody to compare the structures upon the claims and show me each of the elements of the claims. Otherwise, to bunch them together doesn't mean anything. Incidentally, your claims are just three small claims, but you have descriptive material here that covers three pages.

Mr. Jamieson: All right. I was trying to save time. [44] your Honor.

The Court: That is not saving time. Bunching them together is confusing things.

Mr. Jamieson: We thought what we were doing was saving time, taking each separate element, and we thought if you had a record and a transcript it would show. But we will do it the other way, your Honor.

Q. By Mr. Jamieson: Will you take claim 1 of the patent in suit 2,199,611 and state each element of the claim that is in issue.

The Court: At this time we will give the reporter a break and take a short recess.

(A short recess was taken.)

Mr. Jamieson: I will offer in evidence as Plaintiff's Exhibit No. 11 a catalogue of the defendants' structure, and as Plaintiff's Exhibit 12—

The Clerk: Just a minute. Is this exhibit admitted, your Honor?

The Court: Yes.

The Clerk: That is Plaintiff's Exhibit 11 in evidence.

(The catalogue referred to was marked Plaintiff's Exhibit 11, and was received in evidence.)

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Mr. Fulwider: Your Honor, I have worked out an outline which I was going to use later. I would be glad to submit this, to follow the claims there. [45]

Mr. Jamieson: And I would like to offer as Plaintiff's Exhibit 12 one of the defendants' valves to be used by this witness in answering the last question.

The Clerk: That is Plaintiff's Exhibit 12 in evidence.

(The defendants' valve referred to was marked Plaintiff's Exhibit 12, and was received in evidence.)

The Court: You see, the difficulty in these things is this, and the reason why I like to confine testimony to the issues is because you have 50 or 60 elements, or, no, you have 100 of them, or 101, I think, and you start to bunch them up and describe them and we will lose track of the one thing we have to decide. That is, the infringement consists in the novelty which is claimed for this device and which is alleged to be infringed, and the novelty of it, what it added to the art is contained in the claims. And so if a person, whether he be the inventor or an engineer, can give the court a general idea of how the instrument works, then when it comes down to a comparison it should be limited only to the claims, because all others are eliminated for the reason that he isn't claiming everything in the field.

Mr. Jamieson: May I make an explanation, your Honor?

The Court: Yes.

Mr. Jamieson: I asked the question that precipitated this, and the reason I did is that I filed a memorandum [46] which contains a chart of the claims, and each of the claims has certain elements that are repeated,

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and those elements are set forth in the chart. They are boiled down into elements, and I was trying to save repetition, but I would just as leave go through the claims.

The Court: I will tell you why this isn't helpful. These claims are all fashioned in certain manners, and each successive claim, especially in a patent like this with only three claims, carries over the preceding claim, and I desire something more.

Mr. Jamieson: That isn't quite true, your Honor. That is why we made that chart. Some claims are prepared that way, but these are not. Each one is different.

The Court: No. At least, take a look at just one. Look at claim 2, or, let us take claim 1:

"In a safety apparatus for boilers, the combination of a fuel supply conduit, a valve in said conduit, means for yieldingly holding said valve open, a compartment, a diaphragm, a protective liquid . . ."

Now, let me see. We go down and the first four lines of claim 1 are repeated in claim 2. Then on claim 3—

Mr. Jamieson: Claim 3 isn't in issue, your Honor.

The Court: Oh, you are claiming only 1 and 2?

Mr. Jamieson: 1, 2 and 5. You are talking now from [47] the other patent than the one I am speaking of.

The Court: Oh, I beg your pardon.

Mr. Jamieson: The witness was talking about No. 2,199,611.

The Court: I am sorry.

(Testimony of Alva G. Blanchard)

Mr. Jamieson: That is the one we were on. Do you want that patent?

The Court: That is all right, gentlemen. We just got through a long case lasting five and a half days and my pattern changes so fast I think I was still thinking about the portal-to-portal case, and I didn't catch the number. I am sorry. We will start all over and I will have this one in mind.

Mr. Jamieson: I gave your Honor a copy.

The Court: This has 5, and you are claiming 3?

Mr. Jamieson: 1, 2 and 5.

The Court: 1, 2 and 5.

Mr. Jamieson: 3 and 4 we just left out.

The Court: Go ahead from where you were and I will try to follow you.

Q. By Mr. Jamieson: We will start over again and take claim 1, and show the structures of claim 1 in your drawings and then compare that structure with the structure you consider similar in the Pinkerton drawings.

A. In my patent No. 2,199,611, claim 1, the first [48] element is a housing, which I indicate by the numeral 1 in Figure 1. The second element is a plurality of outlet passages through said housing. I indicate this with the passages, or, with the openings 7, 8 and 9 in Figure 2 of this patent. The third element is a valve in each of said passages. I illustrate that as 14, 15 and 16.

Q. Well, rather than go through that way, I want you to take each element and show it first in yours and then in his; one at a time.

The Court: Then it is either there, or it is not, or if he has a substitute, why, indicate that.

(Testimony of Alva G. Blanchard)

The Witness: All right. In Figure 1 of my structure I show the first element, a housing, by the numeral 1. In Pinkerton's structure I also indicate it by the numeral 1 in his Figure 1.

Q. By Mr. Jamieson: Which exhibit are you speaking from?

A. From Exhibit No. 10.

Q. All right. Take the next element.

A. The next element of the claim is a plurality of outlet passages through said housing. This is illustrated in Figure 2 of my patent by the openings 7, 8 and 9. In Pinkerton's structure it is indicated by the openings 8 and 9, which are a plurality.

Q. In which figure? [49]

A. In Figure 2 of the Pinkerton Structure.

Q. Which exhibit?

A. Of Exhibit 10. The third element is a valve in each of said passages. In my structure I illustrate that by the valves 14, 15 and 16 of Figure 2, patent 2,199,611. In the Pinkerton structure these valves 15 and 16 are indicated in Figure 2.

Q. Of what exhibit?

A. Exhibit 10. The next element is: said valves having slots of varying lengths in one end to determine the order in which they are opened. I illustrate that in Figure 2 of my drawing. Valve No. 16 has an opening that loosely fits the pin 18. The second valve 15 has a longer slot in it and the additional length of this slot is indicated by the numeral 21. In the third valve 14 the additional length slot is indicated by the numeral 22, and it is slightly longer than the slot 21.

(Testimony of Alva G. Blanchard)

In Pinkerton's structure his valve No. 15 has an opening in it that the pin 25 fits loosely in. In the second valve 16, which he has made in two pieces and pinned together, the opening is indicated by the numeral 21 in both figures 1 and 2.

Q. Of what exhibit?

A. Of Exhibit 10. The next element is a pin through said slots operated by a lever fulcrumed within said housing. In my Figure 1 I illustrate a pin 25, and in Figure 2 the pin [50] is numbered 18. It passes through the slots in the ends of valves 14, 15 and 16.

Q. And is fulcrumed—

A. The lever 20 is fulcrumed within the housing on a lug, through which there is a pin 24 in Figure 1 of my structure.

In Pinkerton's structure, Figure 1, Exhibit 10, the lever is indicated by the numeral 20, which is fulcrumed on a lug within the housing and the pin is numbered 24. The pin that passes through the ends of the valves in Pinkerton's structure is made in two pieces. A part of the pin goes through the No. 1 valve, which is No. 15 in Figure 2 of Pinkerton's structure, and the other part of the pin is fastened integrally with the lever, and is indicated by the numeral 25, and it passes through the opening fitting in the extension of his valve 16.

The next element of that claim is a float on the end of said lever. In my structure, Figure 1, I indicate the float by the numeral 33 suspended in the water. In Pinkerton's structure he uses a float suspended from the lever 20 at the point 34, and it is the same as my structure.

Then it continues, the description of that element: whereby said valves are opened one at a time in se-

(Testimony of Alva G. Blanchard)

quence, responsive to the downward movement of said float. In my float when 33 falls in Figure 1, the first valve, No. 16, [51] is the first to be removed from its seat. As the float arm 20 continues to fall, the pin 18 comes in contact with the back of the slot 21 in valve 15. Thus the second valve is opened. A continued drop in the lever 20 in Figure 1 brings the pin 18 in contact with the back end of the slot of valve 14 and removes it from its seat. Thus each valve is removed in sequence one after the other until all are opened.

Q. Is that done by the downward movement of the float?

A. That is accomplished by the downward movement of the float, which is very important in this structure.

In Pinkerton's structure, Figure 2, the first valve is removed by the downward movement of the arm 20, by moving in an arc around the pin 24 illustrated at 21. Thus pin 25 in valve 15 is first removed from its seat. A continued downward movement of the float arm 20 results in the extension Pinkerton has fastened to his lever, contacting the lower side of the slot in the extension to valve 16, at which time the second valve is pulled from its seat, and they are thus opened in sequence according to the downward movement of the float.

Q. You use the word "extension." Is there any difference in mode of operation?

A. There is no difference in the mode of operation whatsoever or the results accomplished. [52]

Q. Now, will you take the next claims?

A. The next claim has the first element—

(Testimony of Alva G. Blanchard)

Q. Is that claim 2?

A. Which is claim 2, has the first element as follows: A housing having an opening. In my structure I show this housing 1, and the opening in this housing is the opening that the plug 6 screws into, as indicated by the threads 5.

In Pinkerton's structure the housing is 1, and the opening shown with threads 5 is the opening which the plug 6 closes, which is the same as my structure.

The next element is a plug in said opening. In my structure this opening is closed by the plug 6 by means of threads 5. In Pinkerton's structure this plug is 6 and is closed, the opening is closed by the threads 5, and it is exactly the same as mine.

The next element is: A plurality of outlet passages through said plug. In my structure I show this in Figure 2. The plurality of outlet passages are 7, 8 and 9, and the pipes leading to those outlet passages are 10, 11 and 12. In Pinkerton's structure these openings are 8 and 9 of Figure 2, and the pipes leading from these openings are 11 and 12, respectively.

The next element is: a valve in each of said passages. In my structure I illustrate in Figure 2 valves 14, 15 and 16. In Pinkerton's structure, Figure 2 of Exhibit 10, these [53] valves are indicated at 15 and 16 with an extension on his valve 16. It accomplishes the same results, and results in the same manner that my structure does.

The next element is: a valve operating lever fulcrumed on said plug and extending into said housing. In my structure I show this valve operating lever at 20 and 21 in Figure 2 of 2,199,611, and it is fulcrumed on the

(Testimony of Alva G. Blanchard)

plug by the pin 24, as indicated in Figure 1. In the Pinkerton structure, he has a lever 20, which is fulcrumed on a lug or a plug within the housing by a pin 24, as shown in his Figure 1. This is exactly the same as my structure.

The next element in this claim is: a float on the inner end of said lever. In my structure I show the float 33 attached to the inner end of the lever at the point 34 by a suitable means. In the Pinkerton structure, Figure 1, Exhibit 10, he has a float 33 attached to the inner end of lever 20 by a suitable means indicated at 34.

The next element in my claim is: a cross pin on said lever. I illustrate that in Figure 2 by the pin 18, which is a cross pin on this lever 20. In the Pinkerton structure—

Q. Is it also shown in Figure 1 of your patent?

A. It is also shown by the numeral 25 in Figure 1 of my patent. In the Pinkerton structure, Figure 1, the cross pin is indicated by the numeral 25 and shows one pin. [54]

In Figure 2 of the Pinkerton structure I have numbered both halves of his pin 25. His first half engages the opening at the first valve, and the other part of the pin which is attached to the lever is indicated by the same numeral 25, and extends through the extension to valve 16.

The next element is: stems on said valves having openings therein to receive said cross pin. I illustrate that in Figure 2 of my patent, which shows pin 18 extending through valve 16 loosely, through valve 15 which has a larger opening in the stem, and through valve 14 which has even a larger opening than valve 15 through its stem.

(Testimony of Alva G. Blanchard)

Q. What is the number of that?

A. That opening is 22 in valve 14, and that opening in valve 15 is 21, and the opening fits loosely on the pin for valve 16. In the Pinkerton structure in Figure 2 this is illustrated by the valve stem 15, which has an opening that fits loosely the pin 25. The pin 25 is made in two pieces, and part of it is fastened to the lever and extends through the opening 21 in the extension to his valve No. 16. In the Figure 1 of Pinkerton's drawings the opening 21 is illustrated and the pin 25 extending through it. This pin works exactly the same way in Pinkerton's as it does in mine, and Pinkerton merely makes his pin in two pieces instead of one, as I do.

The next element is: said valve stem openings being [55] of varying lengths, whereby the downward movement of said lever will cause said pin to engage said valve stems to open said valves in sequence, one after the other. We illustrate that in Figure 2 of my drawing, which shows that the pin 18 fits the stem of valve 16, and it passes through the valve stem of 15, which has a slightly larger opening in its end.

Q. What is that number?

A. No. 21. And it must move a little further before the second valve is withdrawn from its seat. The third valve 14 has a slightly larger opening 22 in its stem, and the pin 18 must travel slightly further to reach the back of this slot and withdraw it from its seat.

In Pinkerton's the opening in the valve stem of 15 is approximately the size of the pin 25, so that on a downward movement of the lever 20, the valve 15 is immediately withdrawn from its seat. A continued downward movement of the lever will cause the other half of pin

(Testimony of Alva G. Blanchard)

25, which is fastened to the lever 20 of Pinkerton's, to continue until the pin strikes the back end of the opening 21, as illustrated in Figure 1 of Pinkerton's structure, at which time the second valve is withdrawn from its seat in sequence, the same as mine.

Q. Now, we will take claim 5, of that patent.

A. The next claim, claim 5, has the first element: [56] a plug adapted to close fluid outlet. In my structure I show the plug 6 adapted to close the outlet through the sleeve 3 by the threads 5. In Pinkerton's structure, Figure 1, Exhibit 10, it is shown by the plug 6 screwed into the opening through the sleeve 3 by the threads 5 indicated.

"and having a plurality of fluid passages there-through."

This element is shown in Figure 2 of my structure by having the openings 7, 8 and 9 through the plug 6, in my structure.

In Pinkerton's structure it is shown by having the openings 8 and 9 in Figure 2 through the plug 6. That closes the opening, as shown in Figure 1 of Exhibit 10.

"a valve in each of said passages."

In my structure they are illustrated by valves 14, 15 and 16 within the plug 6 of Figure 2 in my structure. In Pinkerton's the valves 15 and 16 close these openings through the plugs which are numbered 8 and 9.

The next element is: a float operated lever fulcrumed upon said plug. That element in my structure is illustrated in Figure 1 by the float arm 20, which is fulcrumed on the plug 6 by the pin 24, and revolves about this pin.

(Testimony of Alva G. Blanchard)

Q. Is that operated by the float 33?

A. It is operated by the float 33 attached to the lever 20 by the pin 34. In Pinkerton's structure this float operated lever 20 operated by the float 33, connected [57] to the float arm by the pin 34, is fulcrumed on the plug and revolves about the pin 24. It is just the same as mine.

"a pin carried by said lever" is the next element. In my structure this pin is illustrated in Figure 1 at 25, and in Figure 2 by the numeral 18 which extends through all of the valve. In the Pinkerton structure this pin is broken in two pieces, and part of it goes through the No. 1 valve, the other part of the pin is fastened to the lever slightly back of this valve, and it engages the opening in the extension of valve 16, which is shown in Figure 2.

Q. Are both of those carried by the lever 20 in Pinkerton's?

A. The pin 25 in Pinkerton's, that is, both parts of it, are carried by the lever 20 to operate both valves. The next element is: stems on said valves having openings therein through which said pin extends. The openings in each stem being of different lengths than the others and the means to secure said pin in said lever, the stems on said valves having openings therein through which said pin extends are illustrated in Figure 2 of my drawing, in which the stems on the valves 14, 15 and 16 have openings through which the pin 18 extends, and the openings have different lengths, as indicated by the extra length slot in valve 15 by the numeral 21, and by the extra length in [58] the slot 22 in the valve 14. In the Pinkerton structure this is illustrated by the first

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valve loosely fitting the pin 25, and in the second valve 16 the extension to this valve loosely fits the second half of the pin, which is illustrated in Figure 1 by the opening 21. So that that illustrates that the openings in these valve stems are of different lengths to secure a movement of these valves at different times.

Q. How about the means to secure the pin in the lever?

A. The means to secure the pin in the lever are illustrated in my Figure 2 by an upset projection, which upsets part of the metal of the arm 20 over the pin nearest the numeral 19. The means Pinkerton uses to retain this pin is by means of wire, or another pin, as indicated at the ends of 25, and by screwing the second half of his pin in tapped openings in the arm 20 of Figure 2, Exhibit 10.

Q. All right. Now, will you similarly take the claims in issue of the second patent in suit and compare them with your structure and with Pinkerton's?

A. In my second patent, 2,233,395, the first element in claim 1 is: In a safety apparatus for boilers, the combination of a fuel supply conduit. That is best illustrated in Exhibit 8, Figure 1, at 20a in my structure, and in the Pinkerton structure on the right by a fuel line indicated by the numeral 20a, which is the same as mine. [59]

"a valve in said conduit," is the next element. This is illustrated by the valve 20 in Figure 1 of my patent 2,233,395, and by the valve 20 in Pinkerton's structure on Exhibit 8, which is the same as mine.

The next element is: means for yieldingly holding said valve open. This element is illustrated in Exhibit 9, Figure 6, by the spring 77, which yieldingly holds the

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valve 25 from its seat 26. In the Pinkerton structure this is illustrated by the spring 77, which is pressing upwardly against the valve No. 73, holding the valve 75 from its seat 76, which is the same as mine.

The next element in my claim is: a compartment. The compartment in my structure is illustrated by the numeral 72 in Figure 6. In the Pinkerton structure it is indicated by the numeral 72 of Figure 2.

The next element is: a diaphragm. In my structure I indicate this with a piece of rubber 73, extending over the top of the piston which is immediately under the diaphragm. In the Pinkerton structure this is illustrated by the numeral 73 in the form of a leather cup over the piston which is immediately under the leather cup. This leather cup gives the same effect as a diaphragm, in that it is leakproof, and is not subject to leaking, as would other types of piston construction.

Q. Is it an effective seal? [60]

A. It is an effective seal and operates the same as a diaphragm. The next element in my structure is: a protective liquid for said diaphragm in said compartment. The protective liquid is a condensed water in the chamber 72, which keeps the steam from coming in contact—from the means on the boiler that supplies that steam to operate the valve. In the Pinkerton structure the steam condenses in the same manner and forms a protective fluid over the leather valve cup 3, exactly as I do.

Q. Is that in the chamber 72 of Pinkerton's?

A. That is in the chamber 72 of Figure 2 of Pinkerton's structure.

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The next element of my claim is: connections between said diaphragm and valve. The connections between said diaphragm and valve are through the piston 74, which is attached to the piston immediately under the diaphragm 73 in my structure, shown in Figure 6, and the lower end has attached to it a valve 75. In the Pinkerton structure, indicated by the numeral 74, there is a valve stem which is attached to the piston immediately under the leather cup 73, and the lower end has attached to it a valve 75.

The next element is: means for supplying fluid under pressure to said compartment for flexing said diaphragm and moving said valve to closed position. The means for supplying the fluid to said pressure is shown— [61]

Q. You mean “such compartment”?

A. The means for supplying the fluid under pressure to said compartment for flexing said diaphragm and moving said valve to a closed position,—well, the means for supplying the fluid under pressure to said compartment come from the alarm body above, as indicated in Figure 1 of my drawing in 2,233,395 down through the passage 25a to the chamber 71 of my structure. In the Pinkerton structure the means for supplying fluid under pressure to said compartment for flexing said diaphragm and moving said valve to a closed position come from the valve opening through pipe 25a, down through the opening 25a and into the chamber 72, and this pressure moves the leather cup down against the spring 77, and seats it. The action is the same as mine.

The next element is: and manually operable means for relieving the fluid pressure on said diaphragm. I show

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a manual means for relieving the fluid pressure in chamber 72 by the valve 78. When this valve 78 is turned, the opening 78a is opened, permitting the pressure in chamber 72 to be exhausted to the atmosphere, and the spring 77 thereby raising the piston under the diaphragm 73 and at the same time raising the valve 75 from its seat. Pinkerton employs the same structure. The valve 78 is pressed and the valve seat is opened, opening an opening 78a through which the fluid is allowed to escape to the atmosphere, and the valve [62] spring 77 thereby raises the piston and the valve 75 from its seat 76.

The next claim is No. 2. The first element is: in a safety apparatus for boilers, the combination of a fuel supply conduit. The fuel supply conduit is shown by the numeral 20a in the lower part of my Figure 6 of 2,233,395, and is shown in the Pinkerton structure in Figure 2 by the same numeral 28a, as that is part of the —

Q. You mean 20a?

A. 20a—correction,—as that is part of the fuel supply conduit 1.

Q. Is that also shown in Exhibit 8?

A. It is also shown in Exhibit 8 by the numeral 20a, which passes through the fuel cutoff valve 20 in Figure 1 of my patent, and it is also shown by the fuel supply conduit that passes through the valve 20 in Pinkerton's structure, as shown in Figure 1. That is the same as I have.

The next element is: a valve in said conduit. In my structure that is represented in Exhibit 8 by the hold valve 20 in the fuel line 20a to the boiler. In Pinkerton's

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structure it is shown by the hold valve 20 in the fuel line to the boiler, indicated by the numeral 20a.

The next element is: means for yieldingly holding said valve open. The means I use for yieldingly holding the said valve open are the spring 77 pressing up against the piston, [63] which, in turn, presses up against the diaphragm 73, and the lower end of the piston is connected to a piston rod 74, which extends down into the valve and holds the valve in an open position. In Pinkerton's structure he uses the same means, which is a spring 77 pressing up under the piston head which is immediately under the leather cup 73. On the lower end of his connection, between the leather cup and piston assembly there is a rod 74 that extends down into and is fastened to the valve 75, which holds the valve 75 up from its seat 76.

The next element is: a compartment. In my structure I show a compartment 72 immediately above the diaphragm 73 in Figure 6 of 2,233,395. In Pinkerton's structure the compartment 72 is immediately above the piston and leather cup 73, and that is the same as it is in mine.

The next element is: a pressure responsive means to respond to pressure in said compartment arranged to close the valve. The pressure responsive means is the fluid that comes from the boiler into the chamber 72 and thereby forces the diaphragm to be flexed downwardly and through the piston and piston rod 74. Immediately under the diaphragm the valve 75 that is attached to the end of the piston rod 74 is forced down onto its seat.

(Testimony of Alva G. Blanchard)

In the Pinkerton structure the supply of fluid to close the valve comes from the boiler in the same way my fluid does, [64] into the top of his chamber 72, thence pressing downwardly on the piston to which the leather cup 73 is attached, overcoming the spring action 77 and the piston rod 74, to which the valve 75 is attached, which is forced downwardly on its seat 76. That is the same as it is in mine.

The next element is: means for supplying fluid under pressure to said compartment to force said fluid against the pressure responsive means. Means for supplying fluid under pressure to said compartment to force said fluid against the pressure responsive means,—the means that I employ is by the opening of a valve, as shown in Figure 1 of patent 2,199,611, by the downward movement of the float 33, from which the movement is transferred to the lever 20, and the valve in the plug 6 is withdrawn from its seat by the pin 25, which furnishes the means supplying pressure through the pipe 11 to the connection into the top of the valve 25a, as shown in Figure 6 of 2,233,395, and this pressure forces down the piston under the diaphragm 73 and through the stem 74 overcomes the spring action of the spring 77 to force the valve 75 to its seat 76.

In Pinkerton the means for supplying the pressure is by the lowering of the float 33 in Figure 3 of Exhibit 9, and the lowering of the float forces the arm 4 down, to which is attached a valve and seat 15, and by the action of the pin on the back of the valve—pin 9 on the back of the [65] valve stem, the valve is withdrawn from its seat and the steam pressure forces between the valve and the seat 15 through the opening of 25a and thence

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down to the opening 25a and to the top of his fuel cutoff valve, and this pressure then presses down on the leather cup which seals the opening and overcomes the effect of the spring 77 and through the valve stem 74, to which the valve 75 is attached, and the valve is lowered to its seat 76. The action is the same as it is in mine.

The next element is: and non-return means to prevent back-flow of fluid from said compartment to said supply. In my structure, in my original structure my non-return means was the valve shown in plug 6, so that when the water in the float chamber lowered the float 33 through the arm connected to the float rod 20 at 34, it would pull its valve from the seat by the pin 25 and furnish the pressure to operate the fuel cutoff valve. When the float was raised by raising the water in the boiler the float 33 would push the arm 20 through in an upward position until the back of the valve stem came in contact—until the front of the slot in the valve stem came in contact with the pin, and this would force the valve against its seat in the plug 6, and retain the fluid that was entrapped in the chamber 72 to close it. My preferred means of doing this is shown by the check valve 79 and the seat 80. I added this because in [66] my first structure I found that occasionally the valve in plug 6 of Figure 1 drawing of patent 2,199,611 would occasionally leak, and the pressure would pass through the opening between the valve and this seat, and the pressure would gradually build up a pressure in the chamber 72 to such an extent that the diaphragm would be flexed downwardly and close the valve 75 against its seat prematurely. So to overcome this I put a bleed opening, as shown in patent 2,233,395 at point 48a, so that when the float rod

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indicated in Figure 3 of the drawing of patent 2,233,395 was raised, that even if there was a slight leak into this passage, the leak would escape through the bleed opening 48a and not build up a pressure to close the valve. When the valve as illustrated in Figure 1 was withdrawn from its seat by a deliberate downward movement of the float 33, the valve would be drawn far enough from its seat so that the pressure leaking from the bleed opening 48a in Figure 3 would not be as much as the entrance of the steam into this valve, and the pressure would then build up in the chamber 71 and through the check valve 80 into the chamber 72.

In the Pinkerton structure he uses only my first means, non-return means that I employed. The fluid that comes into his valve, as shown in Figure 3, comes in on account of the downward movement of the float 3, which puts the arm 4, which is fulcrumed at point 4a on the plug, and forces the [67] valve through which the pin 9 extends, and thereby opens a clearance between the valve and the seat 15, allowing the pressure to come through 25a and build up in the chamber 72 of Figure 2 of Pinkerton's structure and thereby close the valve. This structure, though, is not satisfactory, even though it works in seventy-five per cent of the cases, because the opening between the seat 15 of Figure 3 will often leak when the water is high, and the float 3 is raised and the valve in its seat should be closed, but this leakage passes through the opening between the valve and the seat 15 through the line 25a and thence on down to the chamber 72 through the opening 25a into this chamber and builds up a pressure and often closes the valve 75 and 76, when it is really not desired.

(Testimony of Alva G. Blanchard)

The next element in my claim is: and manually operable means to relieve the fluid pressure in said compartment. When this fluid is entrapped in chamber 72 in my structure of patent 2,233,395, it may be entrapped by the check valve 79 and 80, or the upper means, as indicated, in the plug by the valve hold on its seat by the pin 25. In either event the chamber 72 is closed until it is desired to open the valve deliberately. At this time I employ a manually operated valve 78 to be opened, at which time the fluid emerges from the chamber 72 through the opening 78a to the atmosphere, and the valve is thereby opened. Pinkerton employs the same [68] means, as shown by the manual release valve 78 in Figure 2 of his drawing, which when pressed opens the opening 78a, by which the fluid entrapped in the chamber 72 can be exhausted through 78a to the atmosphere, which permits the spring 77 to force the piston in an upward position, thereby opening valve 75 and 76. It works just like mine.

In the third claim of this patent the first element is: In a safety apparatus for boilers, the combination of a fuel supply conduit. That combination is illustrated in Exhibit 8 by the fuel supply conduit in Figure 1 at 20a. In the Pinkerton structure on the right it is also indicated by the same numeral, 20a.

The next element is: a valve in said conduit. In my structure that is illustrated by the fuel cutoff valve 20, and in the Pinkerton structure at 20, which is the same as mine.

The next element is: means for yieldingly holding said valve open. That is illustrated in Figure 6 of my patent 2,233,395, by the springs 77 which press upwardly

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against the piston and hold the diaphragm up and the valve 75 from its seat 76. In Pinkerton he employs the same means of holding the valve open, with a spring 77 which presses up under the piston and leather cup 73, and through the valve stem 74 he holds the valve 75 from its seat 76.

The next element is: a compartment. I have a compartment [69] 72 immediately above the diaphragm 73, and he employs a compartment 72 immediately above the leather cup 73 in his structure, which is the same.

The next element is: a pressure responsive means to respond to pressure in said compartment arranged to close the valve. This pressure responsive means is that when pressure is applied in the chamber 72, the diaphragm flexes and the piston under it goes down against the spring 77, forcing the valve stem 74 to which is attached the valve 75 to its seat 76. And that is the same in Pinkerton's, the pressure responsive means responds to the pressure in chamber 72, forcing the leather cup and piston 73 against the spring 77 through the valve stem 74, to which the valve 75 is attached, and forces it to its seat 76.

The next element is: means for supplying fluid under pressure to said compartment to force said fluid against the pressure responsive means. The means for supplying the fluid under pressure in my structure is illustrated in Exhibit 9; in Figure 1 of patent 2,199,611, as the float 33 drops in the water, the lever 20 to which it is attached at the point 34 retracts the valve by the action of

(Testimony of Alva G. Blanchard)

the pin 25 against the back end of the slot in its stem, and thereby removes it from its seat, allowing the steam above the water in the housing there to escape between the valve and seat, and furnish the pressure through pipe 11 down to the connection [70] and to the fuel cutoff valve, Figure 6 in 2,233,395, and into the chamber 71 and through the valve 79 and 80 into the chamber 72. In the Pinkerton structure the same means is employed for supplying pressure by the operation of a float through the arm 4, and the valve is withdrawn from its seat by the pin 9, and the steam pressure above the water passes between the valve and the seat 15 through the opening 25a and into the chamber 72 through the opening 75a, and furnishes the pressure to move the piston downward, thereby overcoming the resistance of the spring 77 through the piston rod 74 to the valve 75, and thereby closing it against its seat 76.

The next element is: and non-return means to prevent back-flow of fluid from said compartment. The non-return means, of course, in the operation of the valve, when the flow of steam through the valve and plug 6 in my Figure 1 of drawing 2,199,611 is going in one direction, it can't flow in the other direction, because it can't do both things at one time. But after the valve illustrated in the cross-section in Figure 6 is closed and the water level in the housing 1 on Figure 1 is raised back to the right level, the valve is seated by the pin 25 pressing against the outward end of the slot in the

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valve, which forces it into its seat, and thereby is a non-return means for preventing the back-flow of liquid from the chamber 72 to the source of supply, [71] through the line 25a. In addition to this non-return means for the purpose that I have already outlined, I have provided another non-return means, as indicated by the valve 79 closing against its seat 80. This has enabled me to provide a bleed opening in the line from the plug 6 to the fuel cutoff valve for leakage so that the valve will not be opened prematurely. In the Pinkerton structure, Figure 3, his non-return means is shown in the same way; that is, when the float 3 pulls the arm 4 downward and the valve on the seat 15 is retracted from its seat, the flow of fluid between the valve and the seat obviously can be in only one direction at a time. If the flow through the line 25a into the chamber 72 of Figure 2 of Pinkerton's structure is sufficient to close the valve, the operator then begins raising the water level in his boiler. When the water level is raised, the float 3 raises the arm 4 on Figure 3 of Pinkerton's structure, and the valve is seated by the pressure of the pin through the valve stem, and it is seated in its seat 15. After it is seated, the pressure in the chamber 72 is retained through the pipe 25a until it is desired to open the valve manually by the manual release 78.

This structure is the same as I employed at first, but my preferred structure I show by the valves 79 and 80 of Figure 6.

(Testimony of Alva G. Blanchard)

The next element of the third claim is: and manually [72] operable means to relieve the fluid pressure in said compartment and thereby open the valve. That element in this claim is illustrated in Figure 6 of patent 2,233,395 by the valve 78, which when turned in a horizontal position opens the opening 78a, allowing the pressure in chamber 72 to exhaust to the atmosphere and the spring 77 to open the valves by their upward thrust.

In the Pinkerton structure, in Figure 2 there is illustrated by the manually operable valve 78, which opens an opening 78a, which permits the fluid and pressure in chamber 72 to exhaust to the atmosphere, and the upward motion of the spring 74 to open the valve.

Q. Do these Pinkerton structures accomplish substantially the same result as accomplished by the devices claimed in your patents in suit? A. They do.

Q. And do they accomplish them by substantially the same means?

A. They accomplish them by substantially the same means.

The Court: It is now 5:00 o'clock. We have been keeping pretty long hours today. As you know, I was on the bench until 1:15 this morning.

Mr. Jamieson: We will suit our hours to your convenience, your Honor. [73]

The Court: That is all right. It is 5:00 o'clock, and I have been working overtime all this week and last week, and we have all day tomorrow, so we can stop

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now. Then we will convene at the regular time and will have nothing else for tomorrow, so that you will have all day.

Mr. Fulwider: Your Honor, could I ask a question? In case we wind up rather rapidly, so that it would come time for argument, would your Honor allow us some time?

The Court: That is always the way. I can see that you want time in between.

Mr. Fulwider: I like to collect my thoughts, your Honor, and if there is time in between, I can do it a little better.

The Court: I will have to think about that and figure it out according to my calendar. The difficulty is I have a full calendar. How is our motion calendar Monday? Have we anything at 2:00 o'clock?

(Discussion between the court and the clerk, as to calendar.)

The Court: We will decide that tomorrow when we get to it. I can't make any promises at this time.

Mr. Fulwider: Very well.

The Court: All right. 10:00 o'clock tomorrow morning.

(Whereupon at 5:00 o'clock p.m. April 1, 1948, an adjournment was taken until 10:00 o'clock a.m., April 2, 1948.) [74]

Los Angeles, California, April 2, 1948;

10:00 O'Clock A. M.

(Other court matters.)

The Court: You may proceed.

The Clerk: Case No. 7734, Blanchard v. Pinkerton, further trial.

Mr. Jamieson: Will you return to the stand, Mr. Blanchard.

ALVA G. BLANCHARD,

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Jamieson:

Q. Approximately what has been your total sales of devices manufactured under the patents in suit since you started?

A. About \$200,000 or over that.

Q. Can you give us an idea of how much your sales amounted to last year in devices manufactured by you under the patents in suit and sold?

A. Last year our sales on those items amounted to over \$58,000.

Q. Are your sales increasing each year?

A. Each year since we started our sales have shown a substantial increase. [78]

Q. Have you any competitors in the devices manufactured by you under the patents in suit?

A. Only this Pinkerton device.

Q. Did anyone else ever infringe the patents in suit?

A. Yes, I had the Reliance Gauge Company of Cleveland, Ohio, make an infringing valve structure.

(Testimony of Alva G. Blanchard)

Q. Were the patents issued at that time?

A. No, that was before my patents issued.

Q. They were still in the Patent Office?

A. They were still in the Patent Office.

Q. When you notified them of your rights, did the Reliance Company cease to infringe?

A. Well, they didn't at first. They applied for a patent on their device and my patent was already in application and the Patent Office declared an interference in the two applications and both of us filed statements of prior conception and they withdrew their patent application because their earliest date of conception was after my date of application, and they also withdrew all of the infringing structures that they had with their dealers and ceased the manufacture of them.

Q. Which patent in suit did that interference and infringement involve?

A. That involved my patent 2,199,611.

Q. Did it involve your patent 2,233,395? [79]

A. No, it did not involve that patent.

Q. Did anyone ever infringe that patent, 2,233,395?

A. No one but Pinkerton.

Q. Since you began? A. Since we began.

Q. Was your action made special in the Patent Office on account of this infringement by Reliance?

A. Yes, it was the subject of a special action because I was able to show that they were infringing it and if my patent was allowed they would be infringing certain claims in it.

Mr. Fulwider: Could I ask the witness to speak up a little? I am having trouble hearing both counsel and the witness.

(Testimony of Alva G. Blanchard)

Mr. Jamieson: I am sorry.

Q. Has anyone ever infringed this patent No. 2,233,395 at any time before it was issued or after?

A. Only Pinkerton.

Q. Would you say then that other than the defendant in this case the public has generally acquiesced to your patent rights in the patent in suit in this case?

Mr. Fulwider: I object to that, your Honor. I haven't raised any objection so far.

The Court: Let me hear the question.

(The question referred to was read by the reporter as [80] follows:

("Q. Would you say then that other than the defendant in this case the public has generally acquiesced to your patent rights in the patent in suit in this case?")

The Court: That does not mean anything. The only object in bringing in the financial success is to show that it is not a paper patent. But the acceptance of it by the public does not mean anything.

Mr. Jamieson: It goes to the question of pioneer patent, your Honor.

The Court: That does not mean anything at all. A pioneering patent is decided by the prior art and not by the public. Sometimes you think you have a patent, Mr. Gillette paid several million dollars for the Probak blade only to find that he bought nothing because the Supreme Court held that the Probak blade was not any improvement on the article, although it had patents, so that he bought nothing.

(Testimony of Alva G. Blanchard)

Mr. Jamieson: I will withdraw the question. I have some authorities that show the materiality of it, but I think it has been fully shown anyway.

Q. If the defendant infringed here in California, in the Southern District and Central Division, would you have continued to sell the devices manufactured by you under the patent in suit in this district? [81]

A. We would.

Mr. Fulwider: I would like to object to that too, assuming a fact that the defendant did infringe. It is a conclusion.

Mr. *Fulwider*: I will change that. I agree with your objection.

Q. If the defendant hadn't manufactured the devices complained of in this district and sold them for less money than yours, would you have continued to sell your devices manufactured under the patent in suit in this district? A. We certainly would.

Mr. Fulwider: I still object, your Honor.

The Court: The objection is sustained.

By Mr. Jamieson:

Q. Have you ceased to sell them in this district?

Mr. Fulwider: I object to that. Why he stopped selling in any district isn't material.

The Court: I will sustain the objection.

The only question before me at the present time, gentlemen, is whether there has been infringement and later on the question is raised whether there has been any damages and, of course, as is customary the question of damages is referred, so that any losses resulting from the infringement or cessation of activities is not a question before the court. [82]

(Testimony of Alva G. Blanchard)

By Mr. Jamieson:

Q. When did you first learn of the defendant's infringing activities?

A. In 1939. That was before our patent actually issued.

Q. Have you any record that was made at that time?

A. Yes, I made a trip here to help with our sales, our representative, Mr. Gene McIntyre, and in traveling over the field we discovered a set of the Pinkerton device in the Athens Field, and these I photographed at the time.

These are the photographs that I made.

Q. Did you make any memorandum on the photographs at the time? A. Yes, I did.

Q. What was it?

A. On the back of one of them I addressed our sales manager, C. W. Longwall, as by just his initials, and I said:

"C. W. These are the Pinkerton alarms and fuel cutoff valves referred to in a recent letter. These are the first they have sold for boilers. Pinkerton refused to let us see how they were made inside. If Gene cannot get something—"

The Court: I think that is a self-serving declaration. I do not think you should read that. The main point is to identify the photograph, the legend. You can only read the [83] fact that shows where you took it and what it was. Any self-serving declarations that you made at the time are not material in this case.

(Testimony of Alva G. Blanchard)

By Mr. Jamieson:

Q. Can you identify that as a photograph that has been in your possession ever since 1939?

A. Yes, it has, and I dated it when I took the pictures.

Mr. Jamieson: I would like to offer those photographs in evidence.

The Court: Very well.

Mr. Fulwider: These are photographs, are they, of the Pinkerton installation?

The Witness: Yes.

The Court: Where was that?

The Witness: In the Athens Field.

Mr. Jamieson: May they be marked as Exhibits 13-A and 13-B?

Mr. Fulwider: What was the date of these?

The Witness: It is on the back of the postcard.

Mr. Fulwider: '39?

The Witness: Yes.

The Clerk: Are these admitted, your Honor?

The Court: Yes.

The Clerk: Exhibits 13-A and 13-B in evidence. [84]

(The documents referred to were received in evidence and marked plaintiff's Exhibits Nos. 13-A and 13-B.)

By Mr. Jamieson:

Q. Would you tell us what happened at the occasion of taking those photographs? What you did.

A. We were very much—that is, Gene McIntyre and myself were very much—surprised and I asked him if he knew Pinkerton, and he said he did know Pinkerton, so we went to Mr. Pinkerton's place.

(Testimony of Alva G. Blanchard)

Mr. Fulwider: Your Honor, I would like to move to strike as to what his agent asked him. I don't want to keep making objections and wasting time, but it seems to me that this whole line of testimony and the way it is put on is objectionable.

The Court: Read the question.

(The question referred to was read by the reporter as follows:)

("Q. Would you tell us what happened at the occasion of taking those photographs? What you did.")

Mr. Jamieson: It is preliminary, leading up to a conversation with the defendant.

The Court: Ask him the question directly.

By Mr. Jamieson:

Q. Did you have a conversation with the defendant [85] Pinkerton at about the time of these photographs? A. Yes, I did.

Q. When did that conversation take place?

A. It took place on the same day that we made the photographs.

Q. What day was that?

A. It is August 24, I believe, 1939.

Q. Where did this conversation take place?

A. In Mr. Pinkerton's shop.

Q. Who else was present besides you and Mr. Pinkerton?

A. Gene McIntyre, our representative.

(Testimony of Alva G. Blanchard)

Q. Will you tell us what was said by everyone at this conversation?

A. We told Mr. Pinkerton that we thought he was infringing there even though we hadn't had our patent issued yet, and asked him for information or to see a drawing of the entire structure, and Mr. Pinkerton refused to let us see anything about it, saying that we didn't have a patent yet.

That was about all that took place at that time.

Q. Did you see any Pinkerton apparatus on this structure that was installed with the Union Oil Company in 1939?

A. Yes, I did.

Q. What did you see?

A. Pinkerton made a feed water valve mechanism that operated on a thermostat principle on the side of the boiler [86] and these feed water apparatuses were on the same boilers that our alarms and fuel cutoff valves were installed on.

Q. How long after that first installation of yours in California did you first see a Pinkerton structure like those charged as infringed in this case?

A. It was about eight months later, I believe, seven or eight.

Q. Where did you see it?

Mr. Fulwider: I didn't get that date, the date of your first installation. When was that?

By Mr. Jamieson:

Q. What was the date of your first installation in California?

A. The date of our first installation in California was about the middle of '38 or the latter part.

(Testimony of Alva G. Blanchard)

Mr. Jamieson: Now will you read my previous question, Mr. Reporter.

(The question referred to was read by the reporter as follows.)

("Q. Where did you see it?")

The Witness: I don't understand the question. Where did I see what?

By Mr. Jamieson:

Q. Where did you first see the Pinkerton devices that are charged to infringe in this case? [87]

A. In the Athens Field in August 1939. That is when I made the pictures of them.

Q. Did you have another conversation with Mr. Pinkerton after your patent issued?

A. Yes, I did. I had another conversation with him afterwards.

Q. Where did that conversation take place?

A. It took place in his office.

Q. When? A. The first part of last year.

Q. Who else was present besides yourself and Mr. Pinkerton?

A. There was no one else present except one of Mr. Pinkerton's workmen who was in the shop, but not close to us.

Q. What was said at that conversation by you and Mr. Pinkerton?

A. Well, I told Mr. Pinkerton that I was positive that he was infringing, as I had bought a sample of his infringing article, and tried to effect a license agreement with him or settle our differences in some way, and we were not able to get together.

(Testimony of Alva G. Blanchard)

Q. Had you previously sent him a notice of issuance of your patents?

A. Yes, as soon as the patents were issued I sent him a notice and a copy of the patents. [88]

Q. Did you mark the devices manufactured by you under the patents in suit with the numbers of the patents after they issued? A. Yes.

Q. Now have you studied the prior art patents that were cited by the defendant in this case?

A. Yes, I have.

Q. Are you familiar with the construction and operation of Patent No. 7767, reissued June 26th, 1877?

A. Yes, I am.

Q. Will you take a copy of that patent and describe to the court the construction and operation of it?

Mr. Fulwider: I object to that, your Honor. That is part of our defense. I don't think it is part of the plaintiff's case in chief, to go over the pleaded patents and explain them to the court.

The Court: I do not think so.

Mr. Jamieson: Our purpose in that, your Honor, is this: It is our position that this is a pioneer patent and we have been informed the defendants are not going to produce an expert to explain the patents. I feel that your Honor will want some explanation of how they work. I know that it can be done in rebuttal and I thought that it would help to do it at this time, then we have everything in. If your Honor would prefer that we do it in rebuttal, I can withdraw the question. [89]

The Court: Supposing that they should choose not to contest the patent but merely to show infringement, then

(Testimony of Alva G. Blanchard)

all this would be a waste of your time and a waste of judicial time.

Mr. Jamieson: Well, it goes to show the scope and treatment to be accorded the patent.

The Court: We do not try these cases in this manner any more.

Mr. Jamieson: I withdraw the question, and that concludes my direct examination.

The Court: We had a recent case in which Mr. Fulwider was, in which he devoted most of his time to show that he did not infringe.

Very well.

Mr. Jamieson: I withdraw the question and that concludes my direct examination.

Cross Examination

By Mr. Fulwider:

Q. Mr. Blanchard, will you give me your residence address?

A. My home address is 3618 Fairfield, Shreveport, Louisiana.

Q. Now as I recall your testimony yesterday, you said that you went into this boiler control or boiler safety apparatus business because of your knowledge of various explosions. [90] is that correct?

A. That is right.

Q. And you were familiar with the industry at that time?

A. Yes, sir.

Q. Were you then manufacturing other equipment?

A. Yes, I was.

Q. Are these photos that were introduced—I believe Exhibits 6 and 6-A—I notice they are all dated June 4,

(Testimony of Alva G. Blanchard)

1937. I assume that is the date on which the photos were taken? A. Yes.

Q. And those photos were introduced merely then to show a typical boiler that had blown up?

A. That is right.

Q. And not boilers that had blown up prior to the entry of you in the field? A. That is right.

Q. Now I believe you also stated that you made a survey of the field but I don't believe you said when. When was it you made your survey of the industry prior to going into the business of manufacturing safety equipment for boilers?

A. Well, you might say I was making a survey all the time because I sold other material that was used on the boilers, such as safety valves and burners and automatic firing [91] controls, and water gauges and gauge cocks, so I was in contact with the field all the time.

Q. You were selling those to the oil industry?

A. To the same people that eventually bought our safety equipment for controlling the feed water.

Q. That was the extent of your survey?

A. Yes.

Q. Now I believe at that time there were other boiler alarms being sold, were there not?

A. Yes, there was half a dozen different kinds of alarms only, that is, high and low water alarms, and just high water alarms and low water alarms.

Q. And were they float operated?

A. They were float operated; yes.

Q. And had a water column attached to the boiler?

A. Yes.

(Testimony of Alva G. Blanchard)

Q. In which the float moved up and down?

A. Yes.

Q. Did they have needle valves?

A. Yes, they all had needle valves.

Q. I believe you mentioned the Reliance. You were familiar with the Reliance products, weren't you?

A. Yes, I sold Reliance alarms before I started making alarms myself.

Mr. Fulwider: I would like to offer in evidence at this [92] time, if I may, a typical Reliance alarm.

That will be our Exhibit 5.

(The instrument referred to was marked Defendant's Exhibit A for identification.)

By Mr. Fulwider:

Q. Is this typical of the high and low water alarms sold by Reliance, we will say, prior to 1930?

A. Yes.

Q. And it has two levers on it, I believe?

A. They have single valves with a lever attached to each one just exactly like you would take a single valve alarm and put two of them together and operate the levers with separate floats and separate rods. There is no two valves attached to each lever.

Q. That is, each lever has its own valve?

A. Each lever and valve and float and rod is entirely separate, just as though you had a separate piece of equipment on each boiler for each purpose, the high water alarm and the low water alarm.

Mr. Fulwider: I offer this in evidence as defendant's Exhibit A.

Mr. Jamieson: No objection.

The Court: Admitted.

(Testimony of Alva G. Blanchard)

The Clerk: Exhibit A in evidence. [93]

(The instrument referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Fulwider: I have here a catalog or sheaf of—

Mr. Jamieson: I would like to ask one question. I understood we were not going to go into the *private* art with this witness.

Mr. Fulwider: I am only covering in this, your Honor, what the witness covered on direct.

Mr. Jamieson: I think if he is going to do it I should be allowed to do it.

Mr. Fulwider: We are not going into the prior art as such.

Mr. Jamieson: This is prior art.

Mr. Fulwider: That is true, but this is the particular art that was mentioned in his direct questions.

The Witness: No, it was never mentioned.

Mr. Fulwider: Reliance was mentioned.

The Witness: Reliance single valve alarm. This is the high-low alarm.

Mr. Jamieson: I object to it on that ground.

The Court: Very well. To be consistent I will sustain the objection.

Mr. Fulwider: It will retain its marking for identification though?

The Court: Yes, it will be marked for identification. [94]

The Clerk: To be marked for identification only?

The Court: Yes.

(The instrument previously marked Defendant's Exhibit A in evidence was withdrawn.)

(Testimony of Alva G. Blanchard)

By Mr. Fulwider:

Q. Now in this survey that you made, did you find anyone else manufacturing fuel shutoff valves that were operated by steam from the boiler? A. No.

Q. Had you ever heard of fuel shutoff valves which were operated by steam coming from the boiler in response to a valve, control valve, opening?

Mr. Jamieson: Same objection. That is prior art.

Mr. Fulwider: I would like to say this in justification of it, your Honor, that the witness talked at great length yesterday about his prior survey and in general what the art showed and didn't show.

The Court: I think I will open the whole thing up and let it go in. It does not make any difference technically when it comes in. I was merely trying to keep the continuity in view of your own objections. If you are going to examine him about his knowledge of the prior art and all that, you are opening up the floodgates, and if you do I might as well open it in the first place.

Mr. Jamieson: I will withdraw my objection then. [95]

Mr. Fulwider: I will withdraw the question. That was the last I had on that particular item anyway.

Q. I believe your testimony was—I couldn't hear you too clearly in all respects yesterday—you conceived the invention disclosed in both of your patents in 1933, was it?

A. Of course when I conceived them it would be difficult to say, because I thought about it from '32 or '31 even.

Q. When did you build the first apparatus as disclosed in your patents?

(Testimony of Alva G. Blanchard)

Mr. Jamieson: I object to that on the ground that that is not in issue. It doesn't refer to anything that was raised on direct.

Mr. Fulwider: It was mentioned in direct. As I say, I didn't get it clearly, but I recall he said he either conceived or first made his invention in '33, then he built the first one in '34. I thought this was the first proper time to nail those facts down.

Q. Isn't that correct, Mr. Blanchard, that you did so testify? A. Yes.

Mr. Jamieson: I object to it on that ground.

The Court: I will overrule the objection.

Mr. Fulwider: Will you read the question.

(The question referred to was read by the reporter as follows:) [96]

("Q. Whn did you build the first apparatus as disclosed in your patents?")

The Witness: I think I built the first one in 1933.

By Mr. Fulwider:

Q. I believe yesterday you said '34, didn't you?

A. I sold it.

Q. That was your first sale?

A. I built them and tested them out for some time before I made a sale on them.

Q. Do you have any evidence of your reduction to practice in 1933?

Mr. Jamieson: That is objected to as not proper cross examination.

The Court: I will sustain the objection.

(Testimony of Alva G. Blanchard)

By Mr. Fulwider:

Q. Your first sale was in 1934. What part of '34?

Mr. Jamieson: Same objection.

The Court: Let me look at the answer. You are not attacking it? You are not pleading limitation to a period?

Mr. Fulwider: No, we are not, because this is very material, because one of our principal defenses is that we were manufacturing the same thing more than two years prior to the day of his patent, as we are today.

The Court: That is not cross examination. You are privileged under 41(c), which corresponds to Section—no, I am [97] sorry, 43(b)—which is the equivalent of 2055 of the Code of Civil Procedure in California, with which you have been familiar for 25 years. You can call him back as a part of your case and examine him as a hostile witness and cross examine him.

Mr. Fulwider: I had no original idea of doing this, but I thought the cross examination was proper.

The Court: No, you are limited by the other. That is cross examination too, but it is a different kind of cross examination.

Mr. Fulwider: May I ask this question: Is it proper to inquire on cross examination on anything that he testified to on direct?

The Court: Yes. I am not limiting you to that.

Mr. Fulwider: That is exactly what I am now inquiring into.

Mr. Jamieson: That is what I am objecting to. It doesn't cover anything that was covered on direct.

Mr. Fulwider: He testified yesterday and again today that his first sale was in 1934. I am merely asking him what month.

(Testimony of Alva G. Blanchard)

The Court: Overruled.

The Witness: I can answer that by saying that I was very careful to get my application filed within the time limit that the Patent Office specifies that a thing must be applied for after it is in general use. At that time I don't [98] remember whether it was a 2-year or a 1-year clause, but I was well within that time.

By Mr. Fulwider:

Q. And you don't know when you made the first sale except that it was prior to the time you filed your application?

A. And within the time limit that the Patent Office specifies for applying for a patent.

Q. So it was sometime subsequent to October 1933?

A. The patent was applied for in '35, I believe.

Q. That is right, October '35.

A. Yes. It was within the time limit prior to that date.

Q. When you filed your application you had never heard of Mr. Pinkerton, I take it?

A. No, I hadn't.

Q. I believe the first time you heard of him and his apparatus was when you came out here in '39, was it?

A. No, it was in '38. We sold an installation of our equipment to the Union Oil Company and we had a device in connection with *out* patents for maintaining the water level in the boiler and naturally we wanted to sell them on that too, but they used Mr. Pinkerton's device there because they had used it before, and told us we should be satisfied with the alarms and fuel cutoff valves. That is the first I heard of Mr. Pinkerton. [99]

(Testimony of Alva G. Blanchard)

Q. Well, now, I would like to ask you this question: Was that apparatus that you sold in 1934—by the way, to whom was that sold?

A. It was sold to the Tippet Drilling Company, as well as I remember.

Q. How do you spell that?

A. T-i-p-p-e-t, I believe. I forget just how to spell that, but I remember that is the name.

Q. That was down in Louisiana? A. Yes.

Mr. Jamieson: Same objection. This is attempting to prove some theory of defense and doesn't refer to anything on direct as to where the sale was made or to whom it was made.

The Court: If a sale is testified to then the details are opened up.

Mr. Fulwider: That is all I am asking.

Mr. Jamieson: All right. I am just trying to understand.

The Court: It is the topic that determines the scope of cross examination, and if the topic is referred to, in other words, you say I saw so-and-so on a certain day, and that is all. Then they ask, what about, and all the details of the meeting and all the details of any conversation.

Mr. Jamieson: I withdrew the objection. [100]

By Mr. Fulwider:

Q. Would you answer the question.

A. Will you repeat the question?

(Testimony of Alva G. Blanchard)

(The question referred to was read by the reporter as follows:

("Q. Well, now, I would like to ask you this question: Was that apparatus that you sold in 1934—by the way, to whom was that sold?

("A. It was sold to the Tippet Drilling Company, as well as I remember.

("Q. How do you spell that?

("A. T-i-p-p-e-t-t, I believe. I forget just how to spell that, but I remember that is the name.

("Q. That was down in Louisiana?

("A. Yes.")

By Mr. Fulwider:

Q. Was the apparatus sold by you to the Tippet Company, or whoever it was, your first sale, constructed exactly like your patent?

A. I believe it was. I don't remember of making any changes.

Q. Did it have the check valve 78 in the fuel valve?

A. It had that as a secondary check valve and the primary means of course was the float holding the valve seated after the boiler was filled with water.

Mr. Fulwider: I move to strike the last part of the [101] answer, your Honor.

The Court: Yes.

By Mr. Fulwider:

Q. What was the date of your first sale in California? Was that the Union Oil job you mentioned?

A. Yes.

Q. That was in 1938? A. Yes.

(Testimony of Alva G. Blanchard)

Q. I believe you testified that Mr. Pinkerton ran you out of California because he was selling his equipment for less than you sold yours, is that correct?

A. Yes.

Q. Did you make any other sales in California after that Union Oil job before you deserted this market?

A. Yes, we did make a few more sales.

Q. And approximately when was the last one of those sales?

A. I don't remember exactly when the last sale was.

Q. Did you have your own salesman out here at that time?

A. Yes.

Q. Did you sell also through supply houses?

A. Yes.

Q. Did Pinkerton underbid you on any particular job?

A. Yes, he did, but the principal trouble was not the [102] underbidding but we had considerable trouble on account of customers calling us and wanting us to make long trips to the field, and we would get out there and find the device that was giving the trouble was Pinkerton's device instead of ours, and ours was well known because we had spent a lot of money advertising.

Mr. Fulwider: I move to strike that latter part. I am asking if Pinkerton ever underbid him.

The Court: I think you should confine yourself to answering the questions. Ordinarily I do not object to a person giving a non-responsive answer because that is not objectionable, but in a case of this character it is better to be confined to the particular topic.

Go ahead.

The Witness: Will you repeat the question, please?

(Testimony of Alva G. Blanchard)

(The question referred to was read by the reporter as follows:

“Q. Did Pinkerton underbid you on any particular job?”)

The Witness: I think so.

By Mr. Fulwider:

Q. Do you know whether or not that was on low pressure or his high pressure apparatus?

A. I didn't know he had two different apparatuses.

Q. You didn't know that he was making a low pressure [103] apparatus with a single needle valve which operated to sound the alarm whistle and cut off the fuel valve prior to the time he made the apparatus which you saw in '38?

Mr. Jamieson: That is objected to as referring to matters not touched on direct examination; leading and suggestive.

Mr. Fulwider: I was merely describing the low pressure apparatus so he would know for sure when he said he didn't know he was making it what he was talking about.

The Court: Overruled.

The Witness: I don't understand exactly what you mean by low pressure apparatus.

By Mr. Fulwider:

Q. May I put it this way then perhaps: Have you ever seen any apparatus sold by Pinkerton which had a float, single needle valve, two parts leading from that valve, one in which passed steam to the alarm whistle and the other which passed steam to a piston which shut off the fuel valve?

(Testimony of Alva G. Blanchard)

Mr. Jamieson: Objected to as not referring to anything on direct examination.

The Court: I will sustain the objection.

By Mr. Fulwider: ,

Q. You mentioned a boiler of yours at Union Oil, was it? A. Yes.

Q. That blew up? [104] A. No.

Q. And it had your equipment on it?

A. No, it wasn't the Union Oil Company.

Q. I thought you said it was the Union Oil Company.

A. No.

Q. What boiler was it that blew up that had your equipment on it?

A. It belonged to a contractor down in Texas, and I have forgotten the name of the field and the contractor's name.

Q. A contractor in Texas? A. Yes.

Q. That isn't the mud pit job Mr. Jamieson mentioned in his opening argument?

A. Yes, that was the one. His mud pit had broken into his boiler feed pit and he had about one more day to drill and he decided to just fire the boiler on mud.

Mr. Jamieson: I believe I can clear that up. I didn't say mud pit, I said mud plant. The Union Oil Company was a mud plant, not an oil well. I guess you misunderstood me.

Mr. Fulwider: That was the plant in Texas?

Mr. Jamieson: No, out here. The mud plant was out here. The mud pit was in Texas.

Mr. Fulwider: I guess I am thoroughly confused.

(Testimony of Alva G. Blanchard)

Q. Which boiler was it that blew up? [105]

A. Well, the boiler that blew up was down in Texas in a field south of San Antonio.

Q. When was that?

A. I don't just remember the date of that but I think it was in '38 or '37.

Q. Now that had some of Pinkerton's apparatus and some of yours also, was that correct? A. No.

Q. That didn't have any of your apparatus?

A. It had all of my apparatus and none of Pinkerton's.

Q. And that blew up because the mud got in the regulator?

A. No, it blew up because the mud got into the boiler and clogged the boiler up so that they just didn't have any water to evaporate and make steam. It was just mud, and finally the crown sheet got so hot that it just pulled apart with what moisture there was still in the boiler.

Q. There was no Pinkerton apparatus on that boiler?

A. No.

Q. Now did you testify yesterday that a boiler somewhere having Pinkerton apparatus on it blew up?

A. No.

Q. As far as you know, no boiler has blown up with Pinkerton apparatus on it?

A. I haven't heard of any. [106]

Q. I take it then that you have no knowledge of a boiler owned by the Ohio Oil Company operated at Gardena, California, blowing up that had your apparatus on it?

A. No. It wasn't reported to me at all, or to our company.

(Testimony of Alva G. Blanchard)

Q. Did you ever have any trouble with your valves corroding or scaling up, sticking?

A. No, I don't remember of having any trouble but I have changed the material in ours to stainless steel, as I think it will last longer.

Q. Have you ever had any valve stems freeze in the valve apertures?

A. Never have that I know of.

Q. I would like to show you here a valve that says on this Inferno, and ask you if that is one of your valves. Does it look familiar?

A. Yes, that is one of mine.

Q. Don't pull it too hard, but I call your attention to the fact that the needle valves are frozen.

A. They move all right.

Q. They move? A. Yes.

Q. But very little?

A. Well, they need cleaning up. It looks like it has seen about four or five years of service without any attention. [107]

Mr. Fulwider: I would like to offer that as our next exhibit, B.

The Witness: May I see that again? There is something about it that doesn't look familiar to me.

(The article referred to was passed to the witness.)

The Witness: Ordinarily we have a much larger opening for our valves to fit in and there is a seat that is pressed in there too, and these don't look exactly right to me for some reason or other. The valves seem to be loose in the seats but the pin has been tightened up so that the lever doesn't work free.

(Testimony of Alva G. Blanchard)

By Mr. Fulwider:

Q. The little washers in between there are all rusted, aren't they? They seem to be tight there.

A. Well, that could be easily done by squeezing these yokes on them. When we send them out there is more clearance than that in between them, and that evidently has been squeezed to make it work tight that way.

Mr. Fulwider: We still offer it.

Do you want to look at it, counsel?

(The article referred to was passed to counsel.)

Mr. Jamieson: No objection. What number is that?

The Clerk: Is this admitted, your Honor?

The Court: Yes. [108]

The Clerk: It is defendant's Exhibit B in evidence.

(The article referred to was received in evidence and marked Defendant's Exhibit B.)

By Mr. Fulwider:

Q. Throughout your discussion yesterday when you were comparing Mr. Pinkerton's apparatus with your own you used the term throughout, or as you were talking, "my float," "my valve," in identifying yours. You didn't mean to infer, did you, that those individual elements were your own design?

A. No. The only thing that I wanted to infer is that all of those elements combined together as described in my claims, they were mine in so far as they were in that combination that I used in describing my claims.

Q. That is what I thought you meant. A. Yes.

Q. But all the individual elements per se, needle valve, float, and container were all old? A. Yes.

(Testimony of Alva G. Blanchard)

Mr. Jamieson: Just a minute. That is objected to on the ground that it is opening up the prior art again. It is the same objection.

Mr. Fulwider: It is merely carrying forward his own statement of yesterday.

Mr. Jamieson: It is an attempt to prove the prior art.

The Court: I will sustain the objection. [109]

Mr. Jamieson: I move to strike the answer.

The Court: It may be stricken.

By Mr. Fulwider:

Q. Now referring to your '395 patent, which is illustrated in your Exhibit No. 9 and seen best in big 6 of that exhibit, as I understand it you have a check valve 79 between your compartment or chamber 72 and your upper compartment chamber 71, is that correct?

A. Yes.

Q. Now would you explain to me just briefly the function of that check valve and when and how it operates?

A. Well, in my first structure I didn't use a check valve there, I had a solid connection from the illustration Fig. 1 in my patent 2,199,611, and as the float held the valve on its seat up above—

Q. Pardon me just a minute. I am just asking about the check valve. In your first one you didn't have a check valve, is that it?

A. I didn't have a check valve.

Q. Did you have a separate chamber 71 as indicated here from your chamber 72, or did you dispense with that chamber 71?

A. No, I just had an opening there, just as it is to hold the quantity of water.

(Testimony of Alva G. Blanchard)

Q. Was that cast in shape as this is here? [110]

A. Yes, sir.

Q. And this passage that is labeled—

Mr. Jamieson: The “this” doesn’t show in the record.

By Mr. Fulwider:

Q. —Fig. 6 on Exhibit 9, this passage 80 then that has a little nipple in there, a fitting, that fitting wasn’t there, was it? A. No.

Q. So the structure was the same except for the valve 79?

A. I had the water chamber above it to provide a cooling medium for the diaphragm below so that as steam hit it it would have a quantity of water to heat up before it heated the diaphragm.

Q. When did you to your knowledge first install one of those check valves 79 in the apparatus illustrated in Fig. 6?

A. Well, as I started to say, I discovered that often-times I wouldn’t get a good seat on my valve structure above, and while the boiler was operating and the water was up to its proper level, there would be a slight leakage between the valve and seat above in the alarm, and that pressure would come on down into the alarm body and cut the fire off when in fact they had plenty of water in the boiler.

Q. At that time you didn’t have your bleeds 48 here, 48-A? [111] A. That is right.

Q. And you had no bleed or relief valve down here, you had the relief valve I assume at 78? A. Yes.

Q. But you had no bleed anywhere in the line?

A. No, I had no bleed in the line.

(Testimony of Alva G. Blanchard)

Q. When was it that you then first started using your check 79?

A. I put that check in there so that I could put a bleed opening in the line and thus relieve any leakage of the valve.

Q. When was that?

A. That was prior to my sale of any of them. That was during my experimental work on it.

Q. So you never sold any without the check.

A. No, I never sold any without the check.

Q. And in your experimental work you tried the first without the check and then put the check valve in and the bleeds 48?

A. I might have sold some of them without that bleed opening at the very first, but I don't believe I did. If I did I changed them all.

Q. What is the function of this check valve 79?

A. The function of the check valve is to retain the pressure that originally encloses the valve until it is desired [112] to open it manually.

Q. If I understood your testimony yesterday, then when the float drops down the valve opens allowing steam to pass through this pipe down into this chamber 71?

A. That is right.

Q. And that has some water in it and the steam exerts pressure on the water, which in turn exerts pressure on the diaphragm?

A. That is right.

Q. Closing your fuel valve?

A. That is right.

Q. Then as the pressure, or when ever the pressure up here in the line, we will say, or in the boiler is reduced this little check valve immediately closes, is that correct?

A. On my preferred structure.

(Testimony of Alva G. Blanchard)

Q. On the structure shown in your patent?

A. Well, that is my preferred structure. I show the other means up above.

Q. We are just talking about the check valve.

A. Yes.

Q. On the check valve 79 shown in this Fig. 6 it encloses, and then it is impossible to open the fuel valve until someone opens this relief valve 78, is that correct?

A. That is right.

Q. Now that would not be the case, however, if you did not have the check valve 79, would it? [113]

A. Well, if it didn't have the check valve I would have to eliminate the bleed line and that would bring me back into the trouble that I experienced first and which Mr. Pinkerton has.

Q. So if you don't have a check valve 79 you must—

A. Have a closed line.

Q. —you can't have a bleed? A. That is right.

Q. I see.

Now, then, if I understand it correctly, in the form shown in your patent in the one which you are selling, which has the check valve 79, when the float goes down and that operates, it stays shut even though the float goes back up, doesn't it? A. Yes.

Q. And it stays shut even though the float stays down?

A. (Pause)

Q. What the float does has nothing to do with whether or not the fuel valve opens?

A. Oh, yes—no, not when it opens.

Q. When you have the check valve? A. Yes.

(Testimony of Alva G. Blanchard)

Q. The only way you can do is for the operator to go and open this relief valve? A. That is right. [114]

Q. In what you call your old form, in the one that didn't have the check valve 79, when the float was down due to low water the needle valves did not open, did they?

A. Yes.

Q. I mean did not close.

A. They were open when there was low water.

Q. So there was nothing to prevent steam from backing up from your diaphragm chamber, up through the line back into the boiler so long as the float was down?

A. Yes, because you always have pressure above the water when those valves are open and fluid couldn't flow in both directions so it has to flow downward.

Q. As long as the pressure in the boiler is more than the pressure in the valve, why the—

A. Flow of steam is that way.

Q. —flow of steam is down, and when that condition obtains there is no non-return means functioning in the line, is there? A. No.

Q. And when a float is down, even though there is no pressure in the boiler, there is no non-return means?

A. We never leave the boiler that way.

Q. Just answer my question. We will assume that your apparatus is operated here now and doesn't have any check valve, it just has a line coming from the boiler down into [115] this diaphragm. The water goes down, the float goes down, the needle valve opens, steam passes down in here (indicating) and operates the diaphragm which closes the fuel valve? A. Yes.

Q. Now if your float is way down here, we will say (indicating)— A. Yes.

(Testimony of Alva G. Blanchard)

Q. Several inches low. A. All right.

Q. Now there is no way for that float to get back up unless they put some more water in the boiler, is there?

A. That is right.

Q. And until the float gets back up there is nothing that will prevent steam flowing backward up this line except the steam pressure in the boiler?

A. The steam pressure in the boiler keeps it up there.

Q. So if the operator were several miles away, or deaf, and didn't come soon, the fire is out and eventually the steam is going to pass out or is going to get cold?

A. That would be true, but I have never seen a case of that kind.

Q. Well, now, in the normal operation this needle valve assembly up at the top cannot prevent back flow of steam or cannot function, we will say, as a non-return means as long as the float is down here in a low water condition, [116] can it? A. No.

Q. Now I believe in your patent you stated that it was very desirable for this return flow, or the possibility of the return flow of steam to be eliminated, did you not, and that is why you installed the check valve?

A. No, I didn't.

Q. You didn't say that? A. No.

Q. Well, now, I call your attention to page 2, line 30 in column 2, which states this:

"In order to insure against premature opening of valve 75 after it has once been closed in this fashion,—"

Now valve 75 is this fuel valve down there, isn't it?

A. Yes.

(Testimony of Alva G. Blanchard)

Q. So you have the fuel valve closed. Continuing:

“In order to insure against premature opening of valve 75 after it has once been closed in this fashion, the pressure built up in chamber 72 will be retained therein by reason of the presence of check valve 79 in passage 80—”

Chamber 72 is this little chamber right above the diaphragm? A. Yes, that is true. [117]

Q. Continuing:

“—and, before the valve 75 can be opened, the attendant must relieve the pressure in chamber 72.”

That is correct, isn't it? A. That is correct.

Q. Is that a desirable feature? A. Yes, it is.

Q. And that can't be accomplished unless you have this check valve, can it, when the float is down?

A. Well, it is never left that way.

Q. Please answer the question yes or no, then you can explain if you wish. I only need a simple answer.

A. If the boiler was left that way—

Q. Let me postulate this question.

Mr. Jamieson: May he finish his answer? There is a question in the record.

Mr. Fulwider: It is a non-responsive answer.

Mr. Jamieson: You said he could answer it and then make any explanation he wanted.

The Court: In that particular instance, it is more of an explanation than a non-responsive answer. Go ahead.

The Witness: Will you repeat the question, please?

(Testimony of Alva G. Blanchard)

(The question referred to was read by the reporter as follows): [118]

("Q. And that can't be accomplished unless you have this check valve, can it, when the float is down?")

By Mr. Fulwider:

Q. That just calls for a yes or no answer. Then you can explain your answer.

A. I don't exactly understand the question. If you will rephrase it, I would appreciate it.

Q. Let us assume that the water in the boiler is low.

A. Yes.

Q. Therefore the float is down? A. Yes.

Q. Therefore the needle valve has been opened?

A. Yes.

Q. Therefore steam has come down and has closed the fuel valve? A. Yes.

Q. There is no way that that fuel valve can be re-opened, is there, other than the operator opening the relief valve 78?

A. Are you speaking of my structure there in the patent?

Q. Where you have the check valve.

A. Yes, that is right.

Q. Now if you don't have that check valve, isn't it a [119] fact that there is no way to keep the pressure on this diaphragm except by raising the float either manually or by putting some water in the boiler, so as to close this needle valve? A. That is right.

Q. So that the advantage recited in the patent here, that advantage of stating thusly—

(Testimony of Alva G. Blanchard)

The Court: What are you reading from, Mr. Fulwider?

Mr. Fulwider: Page 2, column 2, commencing at about line 30.

The Court: Which patent?

Mr. Fulwider: That is the '395 patent.

It states there:

“—After it has once been closed in this fashion, the pressure built up in chamber 72 will be retained therein by reason of the pressure of check valve 79 in passage 80—”

That whole paragraph describes the function of the check valve and its advantages.

The Court: I see.

Mr. Fulwider: Now on line 36 it states:

“This can only be done manually by manipulation of a valve 78 controlling a vent opening 78a in the wall of chamber 72.”

Q. Now is this statement correct in your patent, Mr. [120] Blanchard:

“In other words, once the automatic mechanism for cutting off the supply of fuel has been placed in operation, the fuel line cannot be opened up automatically, but must be done manually by the attendant who would, of course, ascertain that boiler conditions has been restored to normal before again cutting on the fuel.”

That is a correct statement, is it not?

A. Yes, that is correct.

(Testimony of Alva G. Blanchard)

The Court: I think this is a good place to stop. We will have a short recess.

(Short recess.)

The Court: You may proceed.

By Mr. Fulwider:

Q. Maybe we can summarize here and come to an agreement as to what we were discussing just before the recess.

The function performed by the check valve 79 is to prevent the accidental or any other opening of fuel valve 75 once it has been closed? A. Not exactly?

Q. It does perform that function though? Put it this way—

Mr. Jamieson: Objected to as already asked and answered. [121]

By Mr. Fulwider:

Q. The principal function of the valve 79 is to hold the fuel valve 75 closed until the operator opens the cock 78? A. No, that is not the principal function.

Q. What is the principal function?

A. The principal function of that check valve there was to make it possible to put a bleed opening in the line conducting pressure to the fuel cutoff valve so that a leak in the valve above would not necessarily close the valve.

Q. So you put this non-return means in here, this check valve 79?

A. So that we could put the bleed opening in the line to it.

Q. And the reason for the bleed opening was because your little needle valves leaked sometimes?

A. Sometimes, and closed the valve prematurely.

(Testimony of Alva G. Blanchard)

Q. That was one function, we will say?

A. That was the principal function we put it in there for.

Q. That was not, however, mentioned in the patent, was it, that function?

A. I don't remember. I could read it though.

Q. I don't believe it is. The bleeds are mentioned but I don't think— [122]

Mr. Jamieson: The patent speaks for itself.

Mr. Fulwider: All right. We will let the patent speak for itself.

Q. However, there is a function mentioned by the patent, the one I read just before lunch, and this valve 79 does perform that function?

A. Yes, it serves that function in addition.

Q. Now that function is additionally referred to at the very bottom of page 2, column 2, starting with the sentence—well, starting at line 69:

“If, perchance, the attendant is not present or fails to respond to the warning and the water level continues to recede, then, when it reaches a still lower point, control valve 13 of the master unit will be opened and the valve 75 in the fuel supply line will be closed, thus shutting down the boiler and, as pointed out, the boiler cannot again be placed in operation until the attendant has manually relieved the pressure in chamber 72 of the fuel valve control unit.”

That is a correct statement, is it not?

A. That is true, but I didn't draw that specification there. If I had I think I would have mentioned all reasons for it.

(Testimony of Alva G. Blanchard)

Q. But that reason is correct? [123]

A. That is one of them.

Q. That is a function? A. That is a function.

Q. And if the check valve 79 is not present then of course that function is not performed?

A. Unless I closed the bleed opening that I put in the line. It works just as well without the bleed opening and without the check valve.

Q. It may work just as well sometimes but you can't perform that function when the float is down unless you have the check valve 79, can you?

A. Well, in operation when a boiler has low water it is never left in that condition. The water is immediately turned on and sometimes they leave it then and let the pressure go down, but they always start putting the water in the boiler as soon as the fire is cut.

Q. How about when the boiler is dry or practically dry?

A. They always do, because it never reaches a danger point when the fire is cut off. You can always throw water into the boiler when the water is cut off.

Q. When the fireman get sthere the float is down?

A. Yes, and he immediately starts putting his water in there.

Q. Now, as a matter of fact, that function of preventing premature opening of the fuel valve and, as a matter of [124] fact, absolutely preventing the premature opening of the fuel valve prior to the action of the operator in releasing the pressure, is used by you as one of your selling points in your catalog, isn't it?

A. No, I don't think it is.

(Testimony of Alva G. Blanchard)

Q. I thought I read it in your little green catalog last time.

A. Please repeat the question.

Mr. Jamieson: May he be shown the catalog?

Mr. Fulwider: Yes.

Q. Referring to that Exhibit 3, page 5 of your catalog, column 1, we find about line 9 of that last paragraph this statement:

“A check valve installed between the condenser and the cylinder head prevents the fuel from flowing again until the pressure in the head is released (and then this is in capital emphasized letters) BY HAND THROUGH A HAND OPERATED RELIEF VALVE. Thus the fuel cutoff valve gives automatic positive action in cutting off the fire and will not let the fire be turned back on until the pressure is released by the fireman after the water level condition has been corrected.”

Is that a correct statement in your catalog of the function of that check valve? [125]

A. Yes, that is correct.

Mr. Fulwider: Thank you.

The Court: Mr. Fulwider, I am sorry but I have an appointment with counsel regarding a matter at 12:00 o'clock—they are already here—and we will cut the noon hour and return at 1:00 o'clock instead of 2:00 o'clock to make up.

Mr. Fulwider: Thank you, your Honor.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:00 o'clock p. m. of the same date. [126])

Los Angeles, California, April 2, 1948. 1:45 O'Clock P.M.

The Court: Gentlemen, I had a conference which took a little longer than I anticipated. We will continue now without interruption.

ALVA G. BLANCHARD,

the plaintiff herein, having been previously duly sworn, resumed the stand in his own behalf and testified as follows:

Cross Examination (Continued)

Mr. Jamieson: Before we resume, your Honor, I would like to offer in evidence as Plaintiff's Exhibit 8 the drawing that has been marked Plaintiff's Exhibit 8, for identification, and offer in evidence as Plaintiff's Exhibit 9 the drawing which has been marked for identification as Plaintiff's Exhibit 9, and, finally, I would like to offer as Plaintiff's Exhibit 10 the drawing which was marked for identification as Plaintiff's Exhibit No. 10, and from which this witness has testified. That was pursuant to the stipulation that was entered into at the beginning.

Mr. Fulwider: We have no objection.

The Court: All right.

The Clerk: Plaintiff's 8, 9 and 10 in evidence.

(The drawings, heretofore marked Plaintiff's Exhibits 8, 9 and 10, for identification, were received in evidence.) [127]

(Testimony of Alva G. Blanchard)

By Mr. Fulwider:

Q. I would like to ask just a couple more questions about this check valve, and then we will leave that. I noticed, Mr. Blanchard, that you located this check valve 79, between this chamber, top chamber 71 and the lower chamber 72. Does it make any difference in the functioning of your apparatus whether or not you have that check valve where it is, between those two chambers, or up at the top of 71, or anywhere in this line along this side of the needle valve?

A. Well, the location of it between those two chambers is the preferred place, but it would work in any place in the line.

Q. As long as it is somewhere downstream in the steam line from the needle valve assembly up to the top?

A. Not necessarily downstream. It would work with a ball right in the plug.

Q. It could be in the plug 6, shown in your Figure 1?

A. Yes, just exactly where the valve screws in, because the steam as it comes into the line condenses into water and it becomes filled solid with water anyway.

Q. That is what I was wondering about. In the normal course of events, is the chamber 71 and most of the line full of water?

A. Most of the line is full of water.

Q. And sometimes it backs up and I imagine comes out [128] of these little vents 48, and 48a; does it ever go up that far?

A. Yes. Of course, you don't see when it comes up all the way. If you assemble it without the bleed nipple, you can tell it is solid with water.

(Testimony of Alva G. Blanchard)

Q. In the normal operation, when the fireman opens this relief valve 78, after he has the boiler repaired, does he let out very much water or just enough to take off the pressure?

A. He only lets off as much as the piston replaces in moving up to its upward position.

Q. Just enough to take the pressure off, to let the diaphragm come up?

A. There is still some pressure on there, but it lets the piston up.

Q. By piston you mean the diaphragm 73?

A. It moves up and down, yes.

Q. When you said "piston," you meant this diaphragm? A. Diaphragm and piston.

Q. Which is the piston in yours?

A. The piston is right under the diaphragm.

Q. This metal along here that doesn't have any number?

A. Well, a number is on the diaphragm, I believe, too.

Q. 73?

A. 73, yes, and the piston is immediately under that. [129]

Q. I see. Oh, while we are on the matter of the diaphragm, I believe you testified that this diaphragm 73 and the cup which you have number 73 of Pinkerton's on your Figure 2 were equivalents? A. Yes.

Q. I assume that also means that your diaphragm assembly, which has the diaphragm plus this metal ring,

(Testimony of Alva G. Blanchard)

plus the stem 74 is the equivalent of the Pinkerton cup and piston and stem?

A. Yes. I said that I considered them the equivalent because both are leakproof. That is, the cup has the same effect as the diaphragm, but they—

Q. Well,—pardon me.

A. I was going to say that is not true with any type of piston. Only a piston with a diaphragm on it, or I mean with a leather cup or something that will expand and fit the walls like a rubber cup or leather cup.

Q. The purpose is to provide a seal?

A. To provide a leakproof seal.

Q. So that any piston without either a cup on the top—

A. Or rubber ring.

Q. —or sealing ring or packing—

A. I wouldn't say those would be.

Q. That wouldn't do it. Well, so long as it is sufficiently sealed so that it will move down in response to [130] the steam movement is the equivalent of your apparatus, I take it?

A. Any type of piston cup that would lie against the wall without too much pressure to seal it, I would consider the equivalent of the diaphragm. There are other types where the pressure expands the packer in the groove that would serve for the piston in there, and while it was would be tight it would not flexible and I wouldn't consider it mechanically equivalent.

Q. We could say any piston and packing that provides a sufficient seal so long as not to allow too much blow-by and still free enough to operate the valve?

A. No, I wouldn't say that would be the equivalent, that would allow any blow-by at all.

(Testimony of Alva G. Blanchard)

Q. Oh, do you want an absolute seal there?

A. It must be an absolute seal.

Q. Why is that?

A. Because otherwise the valve would begin to open gradually, and someone might be working at something else while it was mechanically cut off, and it would create a hazard.

Q. So that preferably you wouldn't want any leak to appear?

A. No leak whatever.

Q. All right. Now, let's talk a minute about the [131] needle valve assembly. I think this enlarged view is better. This patent, the '611 patent is limited to the valve apparatus, isn't it? I mean, all the claims run—

A. May I come over and read this?

Q. I mean this 2,199,611 patent.

A. Yes, that is a division of my first application, which is covered by patent 2,233,395. It is limited to a valve operating structure.

Q. So far as the wording of the claims is concerned, it doesn't say anything as to where the lines go or where they operate?

A. Well, I believe it states they operate different devices.

Q. But what I am getting at, the essence of the invention is a valve mechanism?

A. I would say that it is the opening of a sequence of valves by a particular means.

Q. That is right. Now, then, in your structure you have three valves in a row and each one has a stem protruding to the rear, and each stem has an aperture in it?

A. Yes.

(Testimony of Alva G. Blanchard)

Q. And one of them has a rather small aperture or slot, so that it has a rather snug fit with the pin, which is called 25 in Fig. 1 and 18 in Fig. 2, and then the next valve, the middle valve has a looser fit? [132]

A. A large opening.

Q. And the third one has a still larger opening?

A. That is right.

Q. As I understand, as your float goes down first it opens the top valve which has the snug fit, then it comes down a little further and this pin 18—and 25 is the same pin, isn't it?

A. Yes.

Q. —opens the center valve, and then further movement opens the third valve?

A. That's right.

Q. Now, let me see. Do you have one of your apparatus here? Referring to your Exhibit 5, this is the same as your patent drawing except it only has two valves instead of 3, doesn't it?

A. That's right.

Q. And as this comes down, you first open the center valve, that is, the one that is in the center here?

A. That's right. The center valve opens first, and then the outer valve second.

Q. And those both are operated by one pin that goes between the ends of this yoke?

A. That's right.

Q. Now, in the Pinkerton device, Exhibit No. 12, first I will refer to the drawing here, Exhibit 10, Figures 1 and 2, [133] and calling your attention particularly to Fig. 2,—this drawing is taken, I assume, from that Exhibit 10—

A. It is.

Q. And they are substantially the same?

A. Yes, sir.

(Testimony of Alva G. Blanchard)

Q. Then you have the lever arm 20 which operates a valve 15 through a connection by this pin you have numbered 25? A. That's right.

Q. And that is one of the two pins that is shown in the model you have in your hand?

A. This is one of the pins, and the other is fastened into the lever.

Q. Now, the second valve 16 is pivoted with another pin to this link or ring member 2—I don't know that it has a number, but the hole is called 21? A. Yes.

Q. Would you explain the operation to his Honor? Would you like to look at this model a minute, Judge?

A. You see when the lever is working in a horizontal position,—you can see it better by looking up—when the float drops it forces the first lever off the seat. This is the first pin here, and this is the equivalent of it.

Q. May I interject: Will you just describe it there? [134]

A. When it drops so far it pushes the second valve off the seat, by an enlarged hole in the end of this valve here, which is the same as my structure, except my pin goes straight through down to push it up, and he makes the valve in two pieces so as to put this pin further back and makes two pins.

Q. This little link that has the hole in it, that is pivotally connected to the valve? A. Yes.

Q. Here is the valve, and that is the link there that is pivoted, and you have a pin here (indicating) and there (indicating)? A. That is right.

The Court: In other words, he has one additional element.

(Testimony of Alva G. Blanchard)

Mr. Fulwider: That is correct.

The Court: And yours are combined in one element, and he makes two elements perform the same function.

The Witness: Well, I would say—

The Court: That is not an argument. I am saying there are two elements.

Mr. Jamieson: Your Honor, two parts of an element.

The Court: In other words, he has one extra. Well, I don't know what other word you can use than "element."

Mr. Fulwider: Link. [135]

The Court: He has an extra link.

Mr. Fulwider: Or ring.

The Court: Or he has an extra ring or stem.

The Witness: My claim calls for a pin through these valves.

The Court: That is right. But he does not have a pin through the valves. He achieves the same result by having a pin above it and with an extra hole.

The Witness: Couldn't you read this, your Honor,—

The Court: Please don't try to argue law with me, sir. You have a competent lawyer. I just want a description so as to have the facts in the case.

The Witness: Yes.

The Court: I don't like lay persons to argue law with me.

The Witness: Excuse me.

The Court: I have been a judge for twenty-two years, and even with patent attorneys I don't like to argue law. But a witness is a witness. Your lawyer, Mr. Jamieson, although he hasn't tried a case before me that I recall, has a very good reputation in the field, and at the proper

(Testimony of Alva G. Blanchard)

time he will argue the law. I am just trying to give this a description. Let's call it two things instead of one.

Mr. Fulwider: An extra gadget.

The Court: An extra gadget or thingumajig. [136]

Then the judge asked a question and he has answered. The question was if he has two things to achieve the result, where you have only one. Isn't that a fact?

The Witness: Yes.

The Court: All right. That is all I want to know.

Q. By Mr. Fulwider: Now, I believe in the operation of your device your pin—well, let's look at Fig. 1; that is easier. You say your pin 25 both opens and closes the valves, doesn't it? That is, when the pin 25 goes to the right in Figure 1 it opens the valves sequentially, and when the pin goes back to the left it closes the valves sequentially?

A. It will do that if there is no pressure in the boiler, but if there is pressure in the boiler they will close the sequence also.

Q. That is what I said, I thought. I meant to say they open sequentially and will close sequentially?

A. If there is pressure in the boiler, and if there is not they are all closed at the same time.

Q. And the closing and opening are accomplished by the engagement of your pin 25 against the slot walls; isn't that correct?

A. Will you repeat that, please?

Q. Let me put it this way: Let's assume an open position with the float down— [137]

A. Yes.

(Testimony of Alva G. Blanchard)

Q. —and the float goes down the yoke carrying the pin 25, it moves the valves to a closed position, does it not?

A. If there is no pressure in the spring above the water. If there is pressure—

Q. What happens?

A. If there is pressure, the boiler pressure throws the valves over.

Q. The boiler pressure is sufficient to close the valves except for the weight of the float?

A. No, I would say except for the weight of the arm and float.

Q. So that there is no pushing effect by this pin 25 to close those valves?

A. When there is pressure on it.

Q. I see. Now, the same is true in the Pinkerton device, isn't it? A. Yes.

Q. That is, if you have got pressure in the boiler, that is sufficient to push the valves closed, so long as they are not actually held away by the weight of the arm?

A. Yes.

Q. Now, just one more question. That is on these photographs. Let me have those, Mr. Pinkerton. [138]

Now, just so that I will clear on these exhibits, No. 11 is one of the Pinkerton catalogues or brochures. Do those photographs look approximately like the Pinkerton devices that you have seen in the field?

A. I think so.

Q. Now, these photographs, Exhibits 13, 13-A and 13-B, which you took of a Pinkerton job,—in Athens, was it? A. I believe so, yes.

(Testimony of Alva G. Blanchard)

Q. But you don't recall the name of the person or company who owned the installation?

A. No, it was a drilling contractor.

Q. A drilling contractor. When were these taken?

A. On August 24, 1939.

Q. Oh, yes. Now, then, examining this 13-A, this looks to me as though there was some kind of an extra bracket on the outside. Can you explain to me what this business here is? It doesn't jibe with the photograph in the Exhibit 11. Do you recall? In other words, my point is that doesn't look, from what there is there, to be a Blanchard—I mean a Pinkerton installation. This part is Pinkerton's, but what is this gadget stuck on the front of it?

A. Well, it looks to me like the Pinkerton valve, like I introduced into evidence, screwed into this flange that is fastened inside of another flange. There seem to be two flanges, one built on top of the other one. [139]

Q. Do you recall whether or not that was the case? Did you take these photographs, by the way?

A. Yes, I took them myself, and I think it was.

Q. Where did that Pinkerton plug valve come from?

A. Where did this installation come from?

Q. Yes.

A. Well, I gathered it come direct from Pinkerton's, a direct sale.

Q. That is, it was this type of alarm body shown in the catalogue, Exhibit 10, which had instead—

Mr. Jannieson: Not 10.

Q. By Mr. Fulwider: —11, in which had been drafted a plug type valve similar to your exhibit we were just talking about, Exhibit 12?

A. Yes.

(Testimony of Alva G. Blanchard)

Q. Is that your recollection?

A. I believe it was. I believe I could see a bright part of it sticking up from the alarm, and to be bright that way it must have been brass.

Q. Did you at that time investigate to see why somebody had modified this Pinkerton alarm body they had by drilling out part of it and inserting a different one?

A. Well, Pinkerton had just made the installation, and I don't believe anyone had touched it since he made it.

Q. You didn't touch it? [140]

A. No, I didn't. I took these pictures of it, and that is all.

Q. These pictures were taken in August, 1939?

A. That's right; and this picture here definitely shows the Pinkerton fuel cutoff valve.

Q. Yes, that picture, that is Exhibit 13, ties in and seems to be identical with the fuel valve shown in his catalogue, but this—

A. This picture here shows both of them together.

Q. The alarm body shown in 13 and the alarm body in 13-A do not jibe with the alarm body shown in Exhibit 11?

A. That's right.

Q. Do you recall noticing that before your testimony this morning?

A. No, I didn't.

Q. But now you remember that?

A. That these photographs seem to be a little different on the alarm body than in my pictures.

Q. And when you took the photographs you recall there was not an alarm body such as then being generally

(Testimony of Alva G. Blanchard)

sold by Mr. Pinkerton which had a combination of two styles?

A. That was the first I had ever seen of the Pinkerton structure or a Pinkerton alarm or fuel cutoff valve, so I had no reason to suppose they had two or three different kinds.

Mr. Fulwider: Just a moment. Your Honor, I would like [141] to offer at some stage, and I will leave it up to the court as to whether this is the proper stage, the head of the alarm body illustrated in the catalogue, Plaintiff's Exhibit 11.

I would like to have it, and I think we might offer it at this time as Exhibit C, and I can ask the witness if he has seen it.

Mr. Jamieson: Why don't you mark it for identification there?

Mr. Fulwider: That is all right. We can mark it for identification.

The Court: All right.

The Clerk: That will be Defendants' Exhibit C.

(The alarm body referred to was marked Defendants' Exhibit C, for identification.)

Mr. Fulwider: This is the valve assembly of the alarm body shown in Plaintiff's Exhibit 11.

The Clerk: Just a moment while I mark it.

Mr. Fulwider: I would like to ask the witness just one or two questions on it.

The Court: All right.

(Testimony of Alva G. Blanchard)

Q. By Mr. Fulwider: Mr. Blanchard, did you ever see a Pinkerton assembly such as this prior to seeing this one down in Mr. Jamieson's office?

A. No, I never did.

Q. You had never taken apart one of his installations [142] that was made according to this Exhibit C?

A. No. The only installations of Pinkerton that I had seen had these four ports on this flange and a hole tapped in this flange that this could screw into, and just this much of the plug sticking out.

Q. You saw a flange like this, but instead of the flange itself forming the body for the valves—

A. It was tapped—

Q. —it had a hole tapped in, in which somebody had screwed a flange?

A. This is one of Pinkerton's, and that is the way he furnished them when I bought this particular one.

Q. When did you buy that one?

A. It was some time prior to 19—

The Court: Let me see that.

Mr. Jamieson: Is there a hole in that?

Mr. Fulwider: No. Somebody had to bore that out, and put in one of these others.

The Court: I see.

Mr. Fulwider: So far as I know, we have never sold one of these with a hole, where one of these could be put in. Our position is that if there was a hole put in it, it was put there long after it left the Pinkerton establishment.

The Court: Is this the accused device?

Mr. Jamieson: This is the accused device. That is the [143] only one I offered in evidence.

(Testimony of Alva G. Blanchard)

Mr. Fulwider: I assume this is also. It has the same lever and the extra link, the same as this one.

The Court: This is set on a flange and that is set on the plug; that can be put in.

Mr. Fulwider: That is right. It is all a matter of how they are fastened into the housing.

The Court: Is that brass?

The Witness: That is brass.

The Court: All right.

Mr. Fulwider: I would like to ask Mr. Jamieson whether or not he charges our Exhibit C does infringe. I assume he does.

Mr. Jamieson: You have asked me that several times, Mr. Fulwider, and each time I have told you we charged plaintiff's Exhibit 12 to infringe. I don't know what you brought in. We bought this in the open market.

The Court: Well, it is very important to know what device is charged, because in many of these cases, if you find infringement or non-infringement, the question always arises as to what exemplification we have before us. I remember one case in which I wrote an opinion, and I think that was the Holmes case,—

Mr. Fulwider: The garage door case.

The Court: —where there was a garage door involved. [144] We had just one device before us, and then counsel came in and tried to get me in contempt proceedings to pass on another one. So I told him that this wasn't the device we discussed and I wouldn't decide on a summary contempt proceeding whether it is the equivalent; that he should either bring a supplemental complaint or a new action on which I could determine that,

(Testimony of Alva G. Blanchard)

rather than in a summary proceeding. So it is very important that we know what device is or is not accused.

Mr. Fulwider: That is my thought, and I may say for the record, and I will be glad to testify to this, that this Exhibit C is the one I left with you, Mr. Jamieson, for a couple of weeks for you to look over and for your draftsman to make drawings, and I don't know just where it was before, but Mr. Pinkerton brought it to me and I took this over.

Mr. Jamieson: My theory of infringement consists in making, using and selling, and sometimes a device can be made in a factory and some sold and some be on the market.

Mr. Fulwider: We will stipulate that has been sold.

Mr. Jamieson: Then I charge that with infringement. I have no proof of that.

Mr. Fulwider: We will so stipulate, and the evidence will show that we have sold many more of them than we have of the plug type.

Mr. Jamieson: All right. [145]

The Court: Very well.

Mr. Jamieson: Is that all of your cross examination?

The Court: Have you finished, Mr. Fulwider?

Mr. Fulwider: I would like to have marked at this time also, for identification, but not to ask the witness any questions about it, a drawing which shows four views of our Exhibit C. It is rather bulky. It can be marked Exhibit D.

The Court: It may be so marked.

The Clerk: That is Defendants' Exhibit D, for identification.

(Testimony of Alva G. Blanchard)

Mr. Fulwider: And that closes our cross.

(The drawing referred to was marked Defendants' Exhibit D, for identification.)

Mr. Jamieson: Before you close your cross, if I may, since we have charged that you infringe with this, I think it should go into evidence.

The Court: All right.

Mr. Jamieson: Bob, why not put that in evidence now, since it is charged to infringe?

Mr. Fulwider: All right: I will offer Exhibits C and D in evidence.

The Court: They will be received.

The Clerk: C and D in evidence. [146]

(The exhibits, heretofore marked Defendants' Exhibits C and D, for identification, were received in evidence.)

Mr. Fulwider: The drawing is a scale model, and we can testify to it to the extent that I instructed the draftsman, and he told me he did, that he made a scale drawing of the model C.

The Court: All right.

Redirect Examination

By Mr. Jamieson:

Q. You testified on cross examination that you made some of your devices like that shown in Exhibit 9, without the check valve 78. How many of those did you make, and what was the history of that? What is the story?

A. That was made in experimental work, and we didn't sell any of them, that I can remember of.

(Testimony of Alva G. Blanchard)

Q. How many did you make?

Mr. Fúlwider: Just a moment. I think he testified he didn't sell any?

Mr. Jamieson: He said he didn't.

The Witness: I made one, that I am certain of.

Q. By Mr. Jamieson: What did you do with it?

A. Well, we took it up and tapped out an opening between the upper chamber and the lower chamber and put a check valve in it. [147]

Q. Did you test it or use it? A. Yes.

Q. How did you test it and use it?

A. We tested on a boiler in our shop.

Q. What did you find as a result of that test?

A. Well, the particular check valve that we put in, as illustrated in that drawing, with a metal—this metal contact wouldn't hold, and we then put a check valve in with a rubber seat.

Q. I mean the one without any check valve at all.

A. The one without the check valve at all held all right, except when the valve above leaked out of the valve assembly,—when it leaked the pressure would build up and cut the fire off when there was plenty of water in the boiler.

Q. Did you make any attempt to sell any of those?

A. No, we didn't.

Q. Why not?

A. Because we considered that a defect in it, and we sought to overcome that defect.

Q. You testified on cross examination that you withdrew from the California field, but it wasn't because of

(Testimony of Alva G. Blanchard)

the price differential. What was the reason for your withdrawing from the California field?

A. We sold a few of our devices in California after Pinkerton's device was put out, and we advertised extensively, [148] though, in "The Oil Weekly," and "The Oil and Gas Journal," and most of the people in the oil world associated the Inferno Company with the fuel cutoff valve, and in a number of instances our representative was called to the field to correct fuel cutoff valve troubles or alarm troubles, and he would make these overhauls for nothing.

Mr. Fulwider: May I move to strike all that, as to what the people in the industry thought.

The Court: Yes.

Mr. Jamieson: You must not say what somebody else thought.

The Court: That may be stricken.

The Witness: The trouble then was that he was having so much trouble looking after something else that wasn't our business, so he gave the account up.

Q. By Mr. Jamieson: Now I heard you testify on cross examination regarding this Exhibit B. Do you consider that that is in serviceable shape now?

A. No, I don't.

Q. Could it be placed in serviceable shape?

A. Yes.

Q. What would you have to do?

A. Quite often there are customers who return these to us and we have an exchange service. We tear them all apart and clean them up and regrind the valves and seats, [149] and send them back to them.

(Testimony of Alva G. Blanchard)

Q. How often should those valves be serviced or inspected in the regular course of the work?

A. Well, in the operation of the safety unit we show the firemen how to check all parts of it every day, so that he knows when he comes on that it is in good working order, and so far as disassembling the whole unit and repairing them, sometimes that is necessary every year. But I have seen them go four or five years without any attention. The trouble is usually found whenever a new fireman comes on a shift and makes his tests.

Q. Now, you testified that in the defendants' device if the fires went out that the float 3 would be in a lowered position, and then the water was poured into it and that raised the float. Now, what is the procedure in that regard in the ordinary practice, as you know it?

A. Well, in the ordinary practice on a drilling rig, whenever the fire is cut off, ordinarily they are still using steam on the rig, and the fireman rushes and drops everything to get that water back into the boiler as quickly as he can, so that he can get his fire started again before the driller notices the decline in the steam pressure.

Q. What does he do to get that water back?

A. Well, if he hasn't got our feed water control mechanism on, he usually ascertains what is the trouble with [150] his feed water system and maybe cleans a strainer or something of that kind, and gets the water going back in the boiler as quickly as possible.

Q. Is that the first thing he does?

A. I would say it is.

(Testimony of Alva G. Blanchard)

Q. When that water comes into the boiler, how much do they put in?

A. Well, they usually put water in until the whistle stops blowing, and the whistle stops blowing after the opening to the fuel cutoff valve is closed, so that he can open his fire again after the whistle stops blowing.

Q. Does the whistle blow continuously until he fills it with water? A. Yes.

Q. And if he fills it with enough water to raise the float high enough to make the whistle stop blowing, does that stop—does that make a non-return means to the fuel cutoff valve?

A. It also shuts the valve off, that pressure stem to the fuel cutoff valve, when the whistle stops blowing.

Q. Then will it have a non-return means?

A. Then that is a non-return means; no float could come back into the boiler even if the pressure went clear off.

Q. Now, turning to Figure 2 of Exhibit 9, what is the [151] function of the part marked 78a and 78?

A. Of Pinkerton's structure?

Q. Of Pinkerton's structure.

A. That is a manual release valve for releasing the pressure in chamber 72 so that the piston will travel upward and carry the valve 75 with it.

Q. Is there any other use or function for that manual release means? A. No other.

Q. Well, could there be any other use for that manual release means, if there was not a non-return means above it? A. I don't believe there could.

(Testimony of Alva G. Blanchard)

Q. Well, then, doesn't the presence of the manual release means indicate anything to you, as to whether there is a non-return means above it?

A. Well, it would signify that there was a non-return means above it, because that would be the only way for it to be expelled.

Q. Would there be any other use for this manual release in valves 78 and 78a, unless there was a non-return means?

A. I can't see any further use for it, except as a means for opening the valve.

Q. As a practical man in the field, would that indicate or prove to you that there was a non-return means? [152]

A. I think it would.

Q. When you purchased this structure of the defendants, Exhibit B, from the supply company, did you buy it yourself?

A. Well, I ordered it by mail.

Q. And have had it in your possession ever since?

A. I have had it in my possession ever since.

Q. Have you made any alterations in it?

A. I haven't touched it, except with my hands to look at it.

Q. Referring to this device, Exhibit B, is there any different function performed by making one of the valves in two pieces instead of one, like yours?

A. Would you repeat that question, please?

Mr. Jamieson: Will you read it please?

(The question was read.)

A. I can see none.

(Testimony of Alva G. Blanchard)

Q. By Mr. Jamieson: Is there any different result achieved by making that valve in two pieces instead of one?

A. I can see none.

Q. Is there any additional function or result, in addition to yours, that is performed by it?

A. No.

Q. Referring to the two-piece pin, is there any additional function that is performed by making the pin in two pieces instead of one, in addition to the function performed [153] by your pin?

A. No.

Mr. Fulwider: Could I ask what pin is made in two pieces?

Mr. Jamieson: Pin 18 or 25, whatever number you want to call it, in the drawings.

Q. By Mr. Jamieson: Do the two pieces of the pin 18 or 25 in the defendants' structure, Exhibit B, do the work that your pin 18 does?

A. They do.

Q. Do they do any additional work?

A. None that I can see.

Mr. Jamieson: That is all.

Recross Examination

By Mr. Fulwider:

Q. Just one question, Mr. Blanchard. That Exhibit B, from whom did you purchase that?

A. That was purchased from either the National or the Oil Well. I could wire the office and find out exactly, if it is necessary.

Q. That is National Supply or Oil Well Supply?

A. One of those two.

(Testimony of Alva G. Blanchard)

Q. And when was it purchased?

A. I think I have had it on hand for a couple of years. [154]

Q. Let me see. This is '48. Was it bought before or after—let me see. Did you say you notified Pinkerton in 1946? Was that it?

A. Well, I had it in my possession when I come to see Pinkerton, at that time.

Q. That was last year, was it, or was it 1946?

A. No, I believe it was last year, the early part of last year.

Q. You had this a couple of years, you think?

A. About that. The record will show exactly when, but I know it was prior to my visit with Pinkerton about the first of last year.

Mr. Fulwider: That is all.

Mr. Jamieson: That is all. The plaintiff rests. Oh, just a minute. Will you take the stand again, Mr. Blanchard? I would like to ask another question.

Redirect Examination

By Mr. Jamieson:

Q. Referring to Defendants' Exhibit C, will you compare it with Plaintiff's Exhibit 12, and tell me if there is any difference in the action of them.

A. Yes. In Defendants' Exhibit C, on an upward movement of the valve the pin is not in contact with the

(Testimony of Alva G. Blanchard)

front end of the slot at all, even when it is seated, and in the Exhibit 12, which is the structure that I bought from either [155] the National or the Oil Well, when the valve is closed the pin is in contact with the upper part of the slot in the valve, which would make it a non-return means, while in this other structure it might not necessarily do it.

Q. Could the other structure be adjusted to do it?

A. Yes, it could be adjusted to do it.

Mr. Jamieson: That is all.

Recross Examination

By Mr. Fulwider:

Q. This link on the end of the fuel valve, or ring, when the lever is up tight to the length of its stroke, there is play there, isn't there?

A. Let me see. Very little.

Q. But it is a loose connection? You can hear it?

A. Yes. Very little.

Q. It is loose enough so that you can hear the tap on the thing? A. Yes.

Mr. Fulwider: That is all.

Mr. Jamieson: That is all, Mr. Blanchard.

(Witness excused.)

Mr. Jamieson: The plaintiff rests. [156]

* * * * *

H. L. HARVILL,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Take the stand, please. What is your name, please?

The Witness: R. L. Harvill, H-a-r-v-i-l-l.

The Clerk: What is your full first name, sir?

The Witness: Henry.

By Mr. Fulwider:

Q. Mr. Harvill, are you acquainted with Mr. Pinkerton, the defendant in this suit?

A. Yes, sir.

Q. Approximately how long have you known Mr. Pinkerton? A. Since the middle of 1929.

Q. What was the occasion of your becoming acquainted with Mr. Pinkerton?

A. Well, I took a position as superintendent of the Master Equipment Company in 1929, and that time they were making feed water regulators, boiler feed water regulators, for Mr. Pinkerton in this plant that I was superintendent in of the Master Equipment Company.

Q. When did you leave Master Equipment Company?

A. I left Master Equipment Company in the middle of '32.

Mr. Fulwider: I would like to have these two exhibits [157] marked; this fuel valve as our next exhibit. That will be E, will it?

The Clerk: That is Defendants' E, for identification.

(The fuel valve referred to was marked Defendants' Exhibit E for identification.)

(Testimony of H. L. Harvill)

Mr. Jamieson: What is that?

Mr. Fulwider: That is a fuel shutoff valve. Then I would like to have marked this alarm body.

The Clerk: You want this other marked also?

Mr. Fulwider: Yes, sir.

The Clerk: That will be Defendants' Exhibit F, for identification.

(The alarm body referred to was marked Defendants' Exhibit F, for identification.)

Mr. Fulwider: These exhibits will be identified later by Mr. Pinkerton, but so Mr. Harvill can get away I would like to have them marked for identification, and then I can put them in later. Now we have photos of those.

The Clerk: Mr. Fulwider, would you mind stating which is Exhibit E and which is F? What is a description of them?

Mr. Fulwider: The first one is a fuel valve assembly. The second one is an alarm body assembly. I have three photographs of these models. They are rather heavy, so that I would put these in along with them, because they are easier for the witnesses to handle. [158]

The Court: All right:

Mr. Fulwider: The next exhibit will be a photograph of the fuel valve. This first one will be a photograph of Exhibit E, the fuel valve. That will be this one.

Mr. Jamieson: Why not mark that E-1?

Mr. Fulwider: May we do that, your Honor? Call the photograph Exhibit E-1? It is a photograph of Exhibit E.

The Court: That is all right.

(Testimony of H. L. Harvill)

The Clerk: This is for identification only?

Mr. Fulwider: Right.

The Clerk: E-1 for identification.

(The photograph referred to was marked Defendants' Exhibit E-1, for identification.)

Mr. Fulwider: And as Exhibit F-1 a photograph of Exhibit F.

The Clerk: F-1, for identification.

(The photograph referred to was marked Defendants' Exhibit F-1, for identification.)

Mr. Fulwider: And as F-2 a photograph of a portion of the inside of Exhibit F.

I have a set of these for you, Mr. Jamieson.

The Clerk: F-2, marked for identification.

(The photograph referred to was marked Defendants' Exhibit F-2, for identification.) [159]

Mr. Fulwider: Here they are in their order, E-1, F-1 and F-2.

(The photographs were handed to counsel.)

Q. By Mr. Fulwider: Now, Mr. Harvill, without my taking these up there, will you tell me whether or not you have ever seen devices such as these exhibits E and F? A. Yes.

(Testimony of H. L. Harvill)

Q. Did you ever do any machine work or otherwise assist in the manufacture of devices identical with Exhibits E and F?

A. Yes, at Master Equipment Company we produced a limited number of both items; 25, I believe, or something like that, prior to my leaving.

Q. Now, these photographs, Exhibits E-1 and F-1, for identification, those two—

Mr. Fulwider: I would like to lift these up if your Honor would wish to take a minute just to glance at them.

The Court: That is all right. Leave them there. I am not a weakling: I can lift that.

Mr. Fulwider: Yes. We don't want to have any accidents here.

Q. By Mr. Fulwider: You say you made those, some of them, when you were at Master?

A. Yes, did the machine work and that sort of thing.

Q. Will you tell me, when did you start on that work? [160]

A. On the boiler alarm valves and the paraphernalia connected with it, we started on that about six months prior to my leaving, which would place it about early in '32.

Q. You mean you left there in 1932?

A. Yes, I left in July or August, '32.

Q. That would be about the first part of 1932, then?

A. Yes.

Q. Now, a part of these are castings, the valve and this yoke? A. Yes.

Q. Were those castings brought in to you for machining? A. Yes, sir.

(Testimony of H. L. Harvill)

Q. Did you have anything to do with making this cylinder on the top which appears to be made out of tubing?

A. I don't recall making a cylinder, doing any of that. Mr. Pinkerton assembled those himself.

Q. Do you recall having seen the assembled unit while you were at Master Equipment Company?

A. Oh, yes.

Mr. Fulwider: I call your attention, your Honor, that it has a piston and cup identical with the piston and cup shown in Figure 2 of Plaintiffs' Exhibit 9. We will have a drawing of that that will show it in detail.

The Court: All right. [161]

* * * * *

Mr. Fulwider: So, we really have two sets of devices here, one made before the patent and one made after the patent. I would like to introduce these for identification. This drawing has a notation "R. Beck 12-19-35" on it, which is an assembly drawing, I guess you would call it. I think this had better be Exhibit E-2. This is a drawing of Exhibit E, so let this be Exhibit E-2.

The Clerk: Defendants' Exhibit E-2 for identification.

Mr. Fulwider: And then Defendants' Exhibit F-3 for identification, [163] a drawing of Exhibit F.

The Clerk: Exhibit F-3 for identification.

Mr. Fulwider: It has a notation, "R. Beck, 12-14-34." Then, as Exhibit F-4, a detail drawing, bearing the notation, "R. Beck, 12-14-34."

The Clerk: Defendants' Exhibit F-4 for identification.

(Testimony of H. L. Harvill)

Mr. Fulwider: This is a detail of the casting. Here is the valve seat. This is the seat for that needle valve. And Exhibit F-5 is a small detail drawing with the notation, "R. Beck, 12-14-34."

The Clerk: Exhibit F-5 for identification.

Q. By Mr. Fulwider: Now, Mr. Harvill, calling your attention to Exhibit E-2, a drawing, Exhibit E-2, can you tell me whether or not that drawing illustrates the mechanism E which was manufactured by you when you were superintendent of the Master Equipment Company?

A. Yes, sir, substantially.

Mr. Jamieson: That is objected to because there is no foundation laid.

Mr. Fulwider: This drawing we will tie in by the draftsman who will be the next witness.

The Court: All right.

Q. By Mr. Fulwider: Now, I call your attention to the piston assembly. This drawing has a cylinder and a piston head and a cup. Will you compare that with what you can see [164] here?

A. Yes, sir.

Q. That is the same as in Exhibit E?

A. Yes, sir.

Mr. Jamieson: We object to that as leading. You are testifying.

The Court: Well, identifying a drawing I don't think involves any question of that.

Mr. Fulwider: I just wanted to be sure what Mr. Harvill was talking about.

(Testimony of H. L. Harvill)

Q. Now, if I can recapitulate a minute, I believe, before recess, you testified you did machine work on the castings of the device identical with this Exhibit E?

A. Yes, sir.

Q. When you were at Master's, prior to July or approximately July, 1932?

A. It was prior to July, three or four months prior to my leaving there.

Q. And you left in the early part of July, 1932?

A. Yes; somewhere around there.

Q. Now, I just quickly call attention to this other drawing, which is Exhibit F-3. Will you compare it with Exhibit F which we have here, which is this ball and float, and tell me whether or not that drawing is, to your recollection, a fair representation of this Exhibit F as you manufactured [165] it?

A. Yes; that is right.

Q. Will you tell us what work you did on these Exhibits E and F, at the Master Equipment Company, in early 1932?

A. We did all of the machine work, drilling and tamping the holes, lathe work, and Mr. Pinkerton assembled it. There was nothing involved in the assembly except we did not make the float.

Q. But did you see any floats in the devices?

A. Yes; we had a sample float around there, and later on—well, this was a year or so later—we did have something to do with these floats.

Q. After you left the Master Equipment Company in the middle of 1932, what did you do in a business way?

A. I became active a hundred per cent in the operation of my own business.

(Testimony of H. L. Harvill)

Q. That is, you had a shop of your own at that time?

A. Yes; I had a shop of my own at the time that I was superintendent of the Master Equipment Company, which I operated during the hours I wasn't working for the Master Equipment Company.

Q. And subsequent to your leaving the Master Equipment Company in the middle of 1932, did you do any machine work for Mr. Pinkerton on devices identical with Exhibits E [166] and F, in your own shop?

A. Yes; subsequent to that we made jigs and fixtures for him for those items.

Q. When would that be?

A. That would be late 1932, or early 1933.

Q. What were those jigs and fixtures for?

A. They were to accurately locate the holes that are drilled and tamped and for accurately locating the holes where the bolts go through. There were no jigs and fixtures made for the lathework because that is done on an engine lathe by a machinist.

Q. And did you do that lathe work in your own shop after you left the Master?

A. No; we didn't do any machine work for the castings in my plant at all.

Q. The only work you did on it was at Master?

A. Except the jigs and fixtures—we might have a sample for the trial of the jigs and fixtures; that is all.

Q. Before we leave this Exhibit E, it has a little fitting here, which comprises F, and the little universal

(Testimony of H. L. Harvill)

fitting and pet-cock. Those were not part of the work that you did, were they?

A. I know nothing about those. Those are standard purchased parts.

Q. Your work covered the globe valve? [167]

A. The yoke, the cylinder and the cap; that is right.

Q. On Exhibit E and Exhibit F, the machine work for the castings? A. That is right.

Q. Did you make this little lever and valve assembly that is part of Exhibit F? A. Yes, sir.

Q. And that, I believe, is illustrated by this small drawing or these two small drawings, Exhibit F-4, being this casting. Will you tell me if that looks familiar to you?

A. Yes; this is a drawing of the cap only and not of the valve and seat.

Q. Of this casting? A. Yes, sir.

Q. And then this small drawing is a picture of what?

A. That is the actuating lever.

Q. That is the lever arm painted silver here?

A. Yes, sir.

Q. Did you ever do any work for or with Harper's Machine Company or Harper's Machinery Company?

A. Yes; I did all of their die casting, dies and their die castings, or a substantial part of their die castings, on the line of small power tools that Harper's made in the beginning of late '32 and '33 and '34.

Q. Did you know anyone at Harper's by the name of [168] R. or R. C. Beck?

A. Yes; he was a draftsman. [169]

(Testimony of H. L. Harvill)

* * * * *

A. Yes, Mr. Beck was there in the drafting department.

Q. And is that the Mr. Beck we saw out in the audience here? A. Yes; the same Mr. Beck.

Q. And do you know whether or not Mr. Beck knows Mr. Pinkerton? A. Yes.

Q. How do you know that?

A. Mr. Pinkerton came to me and decided he was going to have some drawings, and Mr. Beck was a draftsman at Harper's and I sent or got the two together, so that Beck could make some drawings for Pinkerton. Prior to that time Pinkerton never had any drawings on any of his projects.

Q. Will you tell us a little more of your technical background? You had your own machine shop from 1929 on and you were superintendent of Master. Is there anything more you can tell us as to your technical experience and qualifications?

A. Do you want it before or after?

Q. Say from 1929 on.

A. From 1929, I went to work for the Master Equipment Company in the capacity of superintendent, and left there and started my own business, as I mentioned before, in July, 1932, and this business was development work, die casting [172] work and tools and dies; and I continued in that business, also doing jobbing die casting work as an individual operator, until 1935. Then, in 1935, I expanded my plant a little bit and then incorporated under "H. L. Harvill, Inc.," and moved the plant from the rear of my house, where it was up until that time, down to 38th Street in Vernon. And, in 1939,

(Testimony of H. L. Harvill)

we were still in the same line of business. So that I had developed a line of quality castings known as Aircraft Die Castings. And, in 1939, I built a plant on the corner of Mines Field, Century and Sepulveda, which is now known as the Harvill Corporation. And at the time we built that plant the name of the company I was operating was the Harvill Aircraft Die Casting Corporation. Then I acted as manager and president of the Harvill Die Casting Corporation until July, 1942, when I severed from that company and started another company called the H. L. Harvill Manufacturing Company, on 37th Street in Vernon, which I am still operating in Corona. I moved to Corona two years ago. All that time it was substantially the building of die casting machines and producing quality products for the aircraft industry. In addition to that, we made fuel valves and pumps and developed at one time an ammunition booster.

Q. At the time you were at Master with Mr. Pinkerton and had these castings upon which you did work, similar to Exhibit E, were you familiar with steam-operated valves of that [173] type? Had you ever seen any other valves like that?

A. Yes; during the World War I, I was operating a steam plant for the generating of electric power, and this type of valve is nothing new in the business at all. This particular type of valve has been established in all kinds of combinations so long that nobody would consider it a patentable item.

Mr. Jamieson: We move to strike that as a conclusion of the witness.

(Testimony of H. L. Harvill)

The Court: That may be stricken. What you are to give is facts; not your opinion.

A. That is what I am giving you, is facts.

The Court: You started to say something that was a conclusion. That is the point I have to decide. You can say that everybody used them because they are well known, which is all right.

A. Well, they were in general use in 1917. That I know of because that was my first experience in mechanical steam installations. [174]

* * * * *

Q. By Mr. Fulwider: Will you tell us whether or not you saw a valve operated, prior to 1930, that was constructed substantially like Exhibit E, telling us what differences there were?

A. There were numerous installations of valves of that design; a throttle valve for steam, and which can be normally opened and closed and actuated in the same manner on a reduction high-pressure air regulator.

Q. Describe things that were known only to you prior to 1930.

A. Well, this design here in its exact design. This is normally an open valve. In other words, there is a spring under this piston that holds it open.

Q. That is, referring to Exhibit E?

A. Yes. That is held up this way by a spring and it holds a valve off of the seat here and, if there was air or steam applied, it closed the valve. And it can be turned around—that can be turned around the other way. Where the pressure is applied on this end of the cylinder and the spring put on that end, then you have a governor for a steam engine and a valve will be normally closed

(Testimony of H. L. Harvill)

and, as the pressure increases, it requires more and more steam for the operation of the steam engine.

Q. Did you see both of those types prior to 1930? [175]

A. Yes; I saw them many times.

Q. I would like to call your attention to Exhibit 9, which illustrates a diaphragm-operated valve, indicated in Figure 6, and, also, on the right, it indicates a piston-operated valve, which has the notation "Figure 2." Were you, prior to 1930, familiar with valves which were diaphragm-operated, similar to the one illustrated in this Figure 6?

A. Yes; there were many diaphragm valves in use. One of the simplest forms I can think of at present is the pressure regulator for an ordinary home gas meter, which is actuated with a diaphragm and opened and closed substantially the same as that.

Q. I will ask one more question about the Pinkerton device which is illustrated in Fig. 2 of Exhibit 9 and, also, another form of it illustrated in Exhibit E here. This Pinkerton has a cup here on a piston head or supporting the plate. Can you tell me whether or not other kinds of pistons and seals would be equally effective to this cup arrangement?

A. There are many types of cylinder pistons in cylinders. There is an automotive type, where you have rings which would probably work in several appliances as satisfactory as this. There is the old wing type which they use in aircraft running gear cylinders, which would work just as satisfactory as this, by using different materials for the [176] rings, the same as you would use a different material for the cup, according to the

(Testimony of H. L. Harvill)

application of the heat or the steam or the oil, or whatever it is you have actuating it.

Q. Is there a type known as Shevron packing?

A. There are all kinds of Shevron packings which could be used for the piston just as effectively.

Q. Prior to 1930, were you familiar with other kinds of seals for pistons, which were float-operated, than the one shown in Exhibit E-2? A. Yes. [177]

* * * * * * * *

Q. By Mr. Fulwider: May I ask you, Mr. Harvill, this? Comparing the piston and cylinder arrangement, which we will call a float-operated or steam-operated valve, shown in Defendants' Exhibit E-2, with the diaphragm-operated valve shown as Fig. 6 of Exhibit 9, in your opinion, do they accomplish the same function, the function being to shut off a fuel valve?

A. Yes; they accomplish the same purpose. And it can be done many other ways.

Q. Would you say, in your opinion, they accomplish that purpose in substantially the same manner?

A. Yes.

Mr. Fulwider: That is all.

Cross Examination

By Mr. Jamieson:

Q. You never saw this valve before today, this particular valve, did you?

A. No; I never saw that before today. I might have made it. I don't know.

Q. But you can't identify this as being a valve that you have ever seen before?

A. The design, yes; I can.

(Testimony of H. L. Harvill)

Q. But this particular valve you haven't ever seen before? [178] A. No.

The Court: Do you mean that you haven't seen this particular exemplification of it, this type?

A. This design, the shape of the valve. I was instrumental in helping put it together, in establishing the dimensions, shapes and the plans. I was instrumental in helping Mr. Pinkerton in getting the valve together, but this particular one I don't know. This particular valve might have been one of those we machined up for Mr. Pinkerton, or it might have been made yesterday.

Q. By Mr. Jamieson: You don't know when this was made, then? A. I don't know.

Q. You have never seen any of these drawings before today, have you? A. No; I haven't.

Q. You don't know when they were made?

A. I know pretty close to when they were made and I would say that the dates on those drawings were very close to exact.

Q. You don't know that except that you read the dates on the drawings, do you?

A. I introduced Mr. Pinkerton to Mr. Beck for the specific purpose of Mr. Beck making these drawings for Mr. Pinkerton, along about those dates, and I have been very [179] closely associated with Mr. Beck ever since, and I know he didn't do any since then for him.

Q. You didn't see these valves that you worked on at the time that you have mentioned they were assembled? They were taken away from your plant, weren't they?

A. Yes, sir.

(Testimony of H. L. Harvill)

Q. So that Mr. Pinkerton assembled them at his plant?

A. Well, I don't know where he took them. We would machine them up and he would take them.

Q. And you made parts that would look like some of these parts?

A. We made assemblies and, as we made them, we would put them together to be sure they would fit.

Q. Did you make the top part?

A. We made the cap.

Q. There was never any part like this on Exhibit E, the top part?

A. No. These parts from here up we had nothing to do with.

Q. The brass part of the cap of Exhibit E you have seen but you have never seen anything above that?

A. I have seen all kinds of parts like that above it but those are standard parts you can get in any hardware store.

Q. But you didn't see them assembled at the plant? [180]

A. No. I don't know anything about that.

Q. And you don't know what the full combination of any of his parts was?

A. No; not of this valve here or anything that went on after it went out. I don't know anything about those.

Q. I will show you a pump governor. Do you know what a pump governor is? A. Yes.

Q. I am referring to the Blanchard catalogue, Exhibit 3, and, at page 5 thereof, there is a drawing of a pump governor, and the title of the particular section of the

(Testimony of H. L. Harvill)

catalogue is "Pump Governor." Do you know what a pump governor is? A. Yes.

Q. Looking at the lower part of this device that is marked Exhibit E, would you say it looks like a pump governor?

A. It is very similar. It is a governing valve.

Q. Could this be used for a pump governor?

A. It could.

Q. Isn't the purpose of making this Exhibit E hollow, with a space through it, so as to put the adjusting mechanism for a pump governor in?

A. Not necessarily.

Q. That is why it is this shape, isn't it? [181]

A. It is that shape so you can tighten it up.

Q. Then, they adjust this nut so as to close—

A. In relation to your piston up above.

Q. And this is the type that is used on the pump governor? A. It is similar.

Q. Will you compare the drawing of the pump governor in the catalogue with this and tell me the similarities?

A. This pump governor has a double valve in the bottom. The valve action can be normally opened or closed, according to the way you adjust it.

Q. Is the top part the same?

A. It is substantially the same; not exactly: You have a piston and a cap and a brass tube, and that sort of thing.

Q. The side body is similar, isn't it?

A. For all general intents and purposes, it is very similar.

(Testimony of H. L. Harvill)

Q. If you saw this apart, alone, without the top part on it, would you say it was a pump governor?

A. No.

Q. Could it be used as a pump governor?

A. Not without the top there.

Q. I mean this part of it. Would that be part of a pump governor? Could that be assembled as a pump governor [182] just as it is, just like the one that is in that drawing?

A. No.

Q. What change would you have to make?

A. You would have to make a different casting here and have your double seats in the bottom. You only have one seat in here.

Q. It is just a single valve, isn't it?

A. Yes. You could not duplicate this one because you have a double-acting valve there.

Q. You can have single-action valves as well as double-action valves in governors, can't you?

A. Yes, sir.

Q. You don't have any records back of 1935 of any of these transactions referred to, do you?

A. No; I haven't. I have changed organizations and moved around and my records got kind of bulky. I might find them if I looked.

Q. You are relying entirely on your memory as to those dates, aren't you?

A. My memory and the outstanding events that occurred substantially at the same time, like leaving one organization and joining another one and the earthquake.

Q. That is strictly a matter of your memory, in your memory? You haven't refreshed it from any written documents?

A. No. [183]

(Testimony of H. L. Harvill)

Q. So that you have no record or no device or any part that was in existence, since say 1935, like this?

A. I don't know what you mean.

Q. I will reframe the question. You have no record of making any parts like this Exhibit E?

A. I never made any since 1935 of those things.

A. Did you make any before 1935? A. Yes.

Q. Have you any records of those?

A. I have a few records but they are very sketchy.

Q. Do you have any with you?

A. These records here were made then.

Q. Those are not your records, are they, your own?

A. No. But I was working for the Master Equipment Company, and the Master Equipment Company has records pertaining to the construction and the time tickets and the job numbers. And they weren't drawings because the stuff is so simple that we made it—we had a sample and made it from the sample.

Q. And you just made the particular parts you were given to make and you didn't make any other parts that went in the assembly, did you?

The Court: These are all tooled, are they, substantially all lathe work?

A. These parts are sand cast, with the exception of [184] this, which can be a piece of tube, and then they are machined up in a lathe and drill presses.

(Testimony of H. L. Harvill)

Q. By Mr. Jamieson: And the parts you did make, as far as you did go, could have gone into a pump governor or any place? A. That is right.

Mr. Jamieson: That is all.

Redirect Examination

By Mr. Fulwider:

Q. You mentioned the earthquake in response to one of Mr. Jamieson's questions. That is the earthquake that was in March, 1933? A. Yes.

Q. With respect to that earthquake, what is your recollection with respect to the Pinkerton valves?

A. The earthquake came early in 1943—

Q. You mean 1933?

A. 1933, rather. And the work that I did for Pinkerton over at Master was way prior to the earthquake, eight or nine months prior to the earthquake, and I did this work and didn't do any work over in my shop until after the earthquake in 1933. That is when we made the jigs and fixtures.

Q. At the time of the earthquake, you were no longer connected with Master?

A. No; I hadn't been connected with them for eight [185] months.

Q. Where was that Master Equipment Company located?

A. It is at 4481 Blue Mason Street in Southgate. That is just off of Manchester.

Mr. Fulwider: That is all. We will call Mr. Beck.

RUDOLPH C. BECK,

a witness for the defendants, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Rudolph C. Beck.

Direct Examination

By Mr. Fulwider:

Q. Where are you now employed, Mr. Beck?

A. Harvill Corporation.

Q. Is that the Harvill Corporation that Mr. Harvill is now connected with? A. It is not.

Q. Is that the one that he mentioned as being out around—where is it?

A. Century and Sepulveda.

Q. The one he used to be connected with but is no longer? A. Yes, sir.

Q. Where did you become acquainted with Mr. Harvill?

A. I became acquainted with Mr. Harvill when I was [186] working as draftsman at the Harper's Machinery Company. Mr. Harvill was doing contract work for them, I believe, at that time.

Q. Approximately when did you go to work for Harper's?

A. I went to work for them in January, 1933.

Q. How long did you stay with them?

A. I was with them until May of 1936, and was gone from there a short time, a matter of a few weeks.

(Testimony of Rudolph C. Beck)

Q. At the time when you were with Harper's in 1933, was Mr. Harvill doing any work for them on any basis, to your knowledge?

A. Yes; he was. At Harper's Machinery I was on a project of making drawings for a line of woodworking machinery.

Q. Do you remember what they called that?

A. The Wood Wizard line, and that machinery involved the use of a lot of die casting, and Mr. Harvill was tooling and supervising those die castings.

Q. Are you acquainted with Mr. Pinkerton, the defendant in this case?

A. Yes, sir. He was introduced to me by Mr. Harvill for the purpose of making some drawings for him.

Q. Did you make some drawings for him?

A. I did. I made those drawings at home at night.

Q. I call your attention to a drawing here, Exhibit E-2, which has a notation, "R. C. Beck, 4-19-35." Can you identify [187] that drawing for me?

A. There isn't any doubt in my mind at all that this is my drawing, that is, it is characteristic of my drawings. The printing is mine and the signature is mine.

Q. Referring to the date "4-19-35," was it your practice to place a date opposite—

A. It was my practice, as I believe it is the practice of every draftsman.

Q. To your best recollection, is this date the date or is it not the date on which you completed this drawing?

A. I am very positive that is the correct date.

(Testimony of Rudolph C. Beck)

Q. From what did you make this drawing, that is, did you have any parts or sketches or what?

A. The drawings were made up from parts that Mr. Pinkerton supplied me with.

Q. You can refer to this model, Exhibit E.

A. Yes; he had those parts at the time and was desirous of having drawings on them. I was not familiar with this type of equipment.

The Court: Has the witness given the date?

Q. By Mr. Fulwider: What is the date?

A. This one here is April 19, 1935. I did these at home at various times. And I think the dates are given straight around here. Here is "12-13-34."

Q. That is, referring to Exhibit F-5, is that your [188] drawing also? A. Yes; it is.

Q. It bears your name? A. Yes, sir.

Q. And Exhibit F-4 bears the date "12-14-34." What is this date on F-3? A. "12-14-34."

Q. Before we go into that question, will you look at all of these drawings and tell me whether or not they are your drawings and whether or not they were completed about the time of the dates they bear?

A. I am very positive every one of these drawings were made by me on the date written thereon.

Q. The earliest date of any of these is December 14, 1934. Starting with that date, when would you say you started working on any of the drawings pertaining to—

A. I wouldn't be sure of that because I made more drawings, probably on other items probably connected with this, at odd times, in the evenings, and I did work

(Testimony of Rudolph C. Beck)

before this date and it is possible I did work after this date.

Q. While you were working at Harper's?

A. While I was working at Harper's Machinery.

Q. Will you compare this Exhibit E-2 with this model E and tell us whether or not this drawing is a fair representation of that model, or, putting it the other way, is the [189] model E a fair representation of the parts which you said Mr. Pinkerton brought to you and from which you made this drawing E-2?

A. I would say that it is almost identical in principle and proportions.

Q. Now, I call your attention to Exhibit F. This is the bowl and the float. Can you tell me whether or not you made a drawing of castings similar to this?

A. This drawing has a good deal more to it than just this bowl, but the bowl and float on this drawing are identical in principle and proportions.

Q. Here is the rest of Exhibit F. Is this top casting similar to castings which Mr. Pinkerton brought to you and which you drew up on this Exhibit F-3?

A. Yes, they are.

Q. With reference to the detail drawings there, the small drawings, do you find any drawings that correspond to this small casting and float lever?

A. There is a drawing of the lever—

(Testimony of Rudolph C. Beck)

Q. That is Exhibit F?

A. —which is very similar to that.

Q. Is there a detail there?

A. This is the detail of the casting.

Q. That is F-4.

A. This drawing of this casting is identical in [190] principle.

Mr. Fulwider: I think that is all, your Honor.

Cross Examination

By Mr. Jamieson:

Q. Mr. Beck, you don't know what these parts are used for? You just made the parts, is that right?

A. I know what they are for in a general sort of way.

Q. But you don't know what assembly they go into, do you?

A. I know the principle of the valve. It is very apparent.

The Court: Just answer then, if you know, and state what it is.

A. I would have to know to what extent you mean. Shall I explain the assembly to you?

The Court: No; just the general purpose of the whole set-up.

A. Yes; I do know.

The Court: What is it?

A. Do you want this part or this part?

The Court: All of them.

(Testimony of Rudolph C. Beck)

Q. By Mr. Jamieson: Just what you know. May I reframe the question? In other words, you were handed a part like this and told to make a drawing of it, is that right?

A. Yes. [191]

Q. And then you were handed another part and told to make a drawing of it and you did so?

A. Yes.

Q. You didn't make any assembly of the whole thing, did you?

A. Yes. Here is an assembly.

Q. What is it used for?

A. This is primarily a float valve.

Mr. Fulwider: Referring to which one?

Mr. Jamieson: This is Exhibit F-3.

A. Here is a float valve assembly.

Q. By Mr. Jamieson: What is it used for?

A. It is used for—or it might be used for many things. It could be used for blowing a whistle or operating a shut-off valve or operating this shut-off valve.

The Court: Which one do you mean? You are referring to what exhibit?

Mr. Fulwider: E-2 is the shut-off valve.

A. This float valve could operate the shut-off valve at the time water was let out of this chamber.

Q. By Mr. Jamieson: Do you know whether there is any non-return means in this structure, Exhibit E-2?

A. That could mean a lot of things. I would have to have a more definite explanation of what you mean.

(Testimony of Rudolph C. Beck)

Q. Do you know whether there is any manual release to [192] release the pressure inside of this chamber?

A. There is no manual release to release the pressure inside of this chamber on this drawing, no; but one could be attached to this.

Q. There were none on any of the drawings you made?

A. There is none on this drawing, but I can't recall whether there were on any of the drawings.

Q. Is there any such on any of those drawings before you?

A. There is no manual release on any of these drawings.

Q. Is there any means to prevent the pressure in this chamber, as shown in Exhibit E-2, once it has come in there, from escaping?

A. It is prevented from escaping by a gasket seal under the lid and it is prevented from escaping by a cup leather in the cylinder, which is a seal.

Q. Where would the pressure come from to actuate that lever?

A. It would come from this port.

Q. Do you know anything about the parts that go above the port?

A. No, except that I know this might connect with this other valve.

Mr. Jamieson: That is all. [193]

GEORGE WILLIAM ROBSON,

a witness for the defendants, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: George William Robson.

Direct Examination

By Mr. Fulwider:

Q. Mr. Robson, are you acquainted with Mr. Pinkerton, the defendant in this case? A. I am.

Q. Do you know Mr. Harvill, who testified here a few minutes ago? A. Yes; I do.

Q. When did you first—did you ever work for the Master Equipment Company? A. Yes, sir.

Q. Tell me when did you go to work for them?

A. I started to work for Argo and others and then they changed the name to the Master Equipment Company, I think, around 1928, and then I was with them until 1934; 10 years all together.

Q. What was your position or work there at Master?

A. I was a machinist.

Q. Did you work under the supervision of Mr. Harvill, or what was his position? [194]

A. He was superintendent at Master.

Q. Do you have any recollection of when he left Master or how long he was there?

A. In 1932, I think. It was before the earthquake. I think the earthquake was in 1933, and I think he left about 1932.

Q. Calling your attention to this Exhibit E, which is a valve and yoke and piston and a cap, have you ever

(Testimony of George William Robson)

seen valve assemblies identical or substantially identical with that before?

A. Yes; I think I have seen the same valve up there, that we machined.

Q. When was that?

A. Oh, I think that must have been about '32.

Q. And where was that?

A. At the Master Equipment.

Q. Can you see this model down here on the floor?

A. Yes.

Q. The float valve body and the casting and the rest of it is over here, this little top casting with the float lever. Did you do any machine work while you were at Master on any one of these parts?

A. Yes, sir; I think I machined parts similar to them there and the flange.

Q. What can you tell me as to the earliest date of your [195] recollection when you did any of that machine work? First, I will ask you this question. Was it while Mr. Harvill was superintendent of the shop, do you recall?

A. I think I made parts there before Mr. Harvill came in there.

The Court: Can you fix a date or year?

A. 1931 maybe.

Q. By Mr. Fulwider: '31, you say, before Mr. Harvill came?

A. Yes; maybe a little while before he came in.

(Testimony of George William Robson)

Q. Does that apply to both Exhibits E and F?

A. No; this one in particular.

Q. Pointing to this little bracket and float valve lever?

A. Yes.

The Court: Has that been identified yet as an exhibit?

Mr. Fulwider: It is part of F. I took it apart so we could see the inside.

Mr. Jamieson: That is a single valve, isn't it?

Mr. Fulwider: Yes; that is a single valve.

A. There is one needle valve in there, and I see there are two ports, one on this side and one on the top.

Q. Do you recall both of those being controlled by this single valve?

A. When I was there we didn't do any assembly work. We [196] just machined the parts. I think he took those samples and assembled them.

Mr. Fulwider: I think that is all.

Cross Examination

By Mr. Jamieson:

Q. Mr. Robson, you didn't know what these parts were used for after they left your hands, did you?

A. No; I didn't.

Q. And you were just given a print and told to make one part and passed it on?

A. No; I don't think we had a print.

(Testimony of George William Robson)

Q. How did you make the part, then?

A. I think we just had a free-handed sketch.

Q. From that sketch, you made a part that looked like that, is that it? A. Yes.

Q. When did you first see this particular part?

A. I think I saw it only today.

Q. Have you seen any of these parts before today?

A. I have seen that part in Pinkerton's car over a week ago,—

Mr. Fulwider: Exhibit E.

A. —or something similar, but I couldn't say it was the same one.

The Court: Do you mean you have seen something of the same kind but not this particular one? [197]

A. Yes.

Q. By Mr. Jamieson: You don't know what it is used for, do you? A. No.

Q. You don't know what the complete assembly is?

A. No.

Mr. Jamieson: That is all.

A. I just got the sketch and was told to make that, and that was all there was to it.

Mr. Fulwider: Thank you, Mr. Robson. That is all. May we take a recess, your Honor?

The Court: All right.

(Short recess.)

The Court: All right, gentlemen.

Mr. Fulwider: We will call Mr. Brown.

ERLE J. BROWN,

a witness for the defendants, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: E. J. Brown.

The Clerk: What is your full name?

The Witness: Erle.

Direct Examination

By Mr. Fulwider:

Q. What is your address, Mr. Brown? [198]

A. At present I am living in Ventura.

Q. For whom do you work?

A. The Continental Oil Company.

Q. How long have you been with the Continental Oil Company? A. 21 years.

Q. What is your position?

A. I am construction foreman.

Q. At Ventura? A. At Ventura.

Q. Were you ever employed by Continental at Seal Beach, California? A. Yes.

Q. During what years, approximately?

A. Well, the first fifteen years, I would say, of my employment.

Q. And that commenced when?

A. The 9th of March, 21 years ago.

Q. 1927? A. Yes.

Q. Are you familiar with the present line of boiler alarm apparatus that is sold by Mr. Pinkerton, as illustrated by Plaintiff's Exhibit 10, or 11, this little brochure which is Plaintiff's Exhibit 11? Are you familiar with that line of equipment? [199] A. Yes.

(Testimony of Erle J. Brown)

Q. Did you ever see any boiler alarm and fuel valve shut-off equipment of Mr. Pinkerton's while you were at Seal Beach? A. I did.

Q. Will you tell me approximately when that was and the circumstances involved in your becoming acquainted with that equipment? A. Well—

Q. First, I will say was that equipment the same as this catalogue or was it a different style?

A. Well, that is asking a lot from memory, to go back that far. It was, yes.

Q. Let's skip the catalogue. Just tell us whether or not Mr. Pinkerton ever installed any boiler alarm and fuel valve shut-off equipment, that was responsive to low water in boilers, at Seal Beach? A. He did.

Q. And approximately when was that?

A. Well, somewhere between June of 1932 and February 15, 1933.

Q. How do you fix June of 1932?

A. Well, we had a boiler explode at Seal Beach during the time that our district superintendent, Mr. Van Slack, was there, and he died on the 15th of February. And we had taken [200] precautionary measures between the time this boiler blew up and before he died. That is the only way I can establish those dates.

Q. I believe he died on the 25th.

A. Was it the 25th? It was just before the earthquake come.

Mr. Fulwider: I might just as well put that certificate in now, a certified copy of the death certificate of Frank Van Slack, whose death is a landmark date with Mr. Brown. Mr. Van Slack was superintendent of that Seal Beach area.

(Testimony of Erle J. Brown)

The Court: All right; it may be received.

The Clerk: Defendants' Exhibit G in evidence.

Q. By Mr. Fulwider: Did the apparatus which Mr. Pinkerton installed for the Continental Oil Company, at Seal Beach, between June or July, 1932, and Mr. Van Slack's death in 1933, have a float? A. Yes.

Q. Was it float operated? A. Yes.

Q. I call your attention to Exhibit F, which is this on the floor, comprising an alarm body, with a float in it, and a bracket casting that fits on the top, which has a lever, and which operates a needle valve coming out, and there are two ports coming out. Is that equipment similar to what Mr. Pinkerton installed for you people in 1932? [201]

A. There is some detail I couldn't be certain of because my work was confined mostly to installation of the equipment from the mechanical standpoint, and I wouldn't be able to identify that arm, for instance, or that, but I do know it had a float because we had taken it apart and looked at it, but we were concerned chiefly with the outside installations as a pipefitting crew.

Q. Tell me, when the water in the boiler became low and the float went down, what happened?

A. When the water got low and the float went down, there was a piston action there that would cause the whistle and the fuel in the fuel line to be shut off.

Q. That is, there were two steam lines leading from the body which was located up at the water level on the boiler? A. Yes.

Q. Similar to this Exhibit F, and one line led to a whistle and one to a fuel shut-off valve, is that right?

A. Yes; that is right.

(Testimony of Erle J. Brown)

Q. Do you remember whether the fuel shut-off valve you had in the lease of the Continental in Seal Beach was similar to this Exhibit E?

A. That is just another valve to a pipefitter. It could have been that identical valve or it could have been one with many changes but, in working there, I know it was one similar to that. [202]

Q. Do you know whether or not the valve that was installed at Seal Beach had a piston in it which was operated by steam pressure? A. Yes; it did.

Q. And did a movement of the piston close the valve?

A. The movement of the piston closed the valve; yes.

Q. And the steam to move the piston came from the boiler when the float went down?

A. Yes; that is right.

Q. And then I believe you said a whistle blew also?

A. That is right.

Q. Did those two things happen at the same time, or do you remember? A. Well, I don't know.

Q. Calling your attention to this valve, Exhibit E, and the drawing of it here in front of you, Exhibit E-2, in 1932, did you have any familiarity with piston-operated valves? This drawing, I might mention, shows a valve down here at the bottom, and a yoke and a valve stem goes up and is hooked onto a piston here, which has a cap and float, which can be admitted to the top of the cylinder. With that much of a description of that, were you familiar at that time with valves of that nature?

A. Of that nature; yes.

Q. Did they accomplish substantially that purpose? [203] A. They can be made to do that.

(Testimony of Erle J. Brown)

Q. Can you tell us anything about in what fields or what kinds of valves you have in mind?

A. There is pressure regulators, governor valves and things that are operated with a piston and numerous little things not manufactured and unpatented gadgets that people make to take care of their own things. This is nothing new so far as—

Mr. Jamieson: We move to strike that out as a conclusion.

The Court: It may be stricken. You may state whether you have seen devices like this. Have you?

A. Yes. I could go back to 1928 or 1929.

The Court: All right.

Q. By Mr. Fulwider: Can you tell me whether or not the fuel valve that was installed for Continental at Seal Beach, in 1932 or 1933, had any fittings similar to these fittings which are on the top of this Exhibit E?

A. Well, that is getting into rather a minute detail but—

The Court: Generally.

A. Had there not been one at that particular place, I believe I would have put one on for my own protection. It has a steam connection to this F. It has a safety feature that I would be watching for. I would want it on there so I [204] would have some way of defending myself against hot steam.

Mr. Fulwider: I have a drawing here. This is a drawing of a typical installation. I am not sure whether it is more than an artist's conception but it is illustrative at least, and it is the only thing we have of the type of hookup. May that be marked for identification as our next number?

(Testimony of Erle J. Brown)

The Court: All right.

The Clerk: Defendants' Exhibit H for identification.

Mr. Fulwider: This has a notation, "Drawn by A. J. Allen," and the further notation, "7-1-35." That is a few months prior to the filing of the application.

Q. This is a drawing, of course, that was made after your installation but, looking at it for comparative purposes, can you tell me whether or not the installation at the Continental lease in Seal Beach was similar to this and, if not, in general how it varied, so we will have some sort of a picture of what that was?

A. Yes; in general principle, this is the same. Of course, our hook-up was different than this because this shows it shutting off the individual fuel and our fuel entry into the fire box was different than this.

Q. Let's take them item by item. Starting up here with the alarm body, is that the approximate location of the Pinkerton alarm body there at Seal Beach?

A. Yes; I would say that is, and that could be anywhere [205] in the dome of the boiler.

Q. And there is a line or two steam lines that lead out of this bracket; one goes up here to this line, which is hooked up to a whistle through a piston valve there, and then there is another steam line comes from this top assembly down into—

Mr. Jamieson: We object to counsel testifying on the ground it is leading and suggestive.

(Testimony of Erle J. Brown)

Mr. Fulwider: I am just telling him what is on the drawing and then it is up to him to say whether or not it is similar.

A. I can answer. It is similar. We had no drawing to work from when we made it. We made the installation and that was that.

Q. By Mr. Fulwider: Suppose you just give us, in your own words, a description of that Pinkerton device.

A. Without the drawing?

Q. Yes; without the drawing.

A. Pinkerton was there and we were supposed to do the work for him. Some of the details I remember was boring and drilling and tapping the hole in the side of the boiler, at the side of the boiler proper. It was rather a difficult proposition to get in between the two hot boilers and drill that hole and hand-tap it, particularly for a man of my size. There isn't very much room. And it had to be done with one shut [206] down and with the one next to it alive. And we thought at that time it was a rather ridiculous installation. It was something new. And we thought we were being abused by having to do it under those circumstances. That is one thing that comes definitely to my mind, that Pinkerton was there. Following the blow-up of the other boiler, though, we felt we had to have something and then, after we began to see that he really had something, we went ahead and installed it.

Q. Who gave the orders for the installation? Who was in charge there at that time?

A. I wouldn't remember who gave me those. My immediate superior was Fred P. Miller. He was the lease production foreman under Van Slack and I don't know

(Testimony of Erle J. Brown)

whether he did it or whether Van just brought it over and said, "Brownie help him put it in." We were not very formal in those days.

Mr. Fulwider: I believe that covers it, your Honor.

Cross Examination

By Mr. Jamieson:

Q. What was your position at the company at the time that this installation you have testified about was made?

A. I was a gang pusher.

Q. What did your duties consist of?

A. That was generally construction work, pipe work, gas and oil separators, pipelines and boiler installations.

Q. Did you have blueprints to work from? [207]

A. On occasions; yet.

Q. At the time of this installation?

A. Do you mean for this particular job?

Q. Yes.

A. Well, I don't remember whether I did or not.

Q. Did you have drawings of any kind on that job?

A. I don't remember.

Q. Have you any drawings now that would show what was in that job? A. No.

Q. Were you in charge of the work?

A. In charge of the installation; yes.

Q. You were in charge of the installation for Mr. Pinkerton, is that it? A. Yes.

Q. And you did what he told you to do?

A. That is right.

Q. Did he give you the whole job or piece by piece?

A. I wouldn't remember.

(Testimony of Erle J. Brown)

Q. Do you remember where the parts came from and what they looked like?

A. I don't understand your question.

Q. What part do you remember, that you saw at that time, that you remember of your own memory now?

A. The whole assembly. [208]

Q. Name one part that you remember.

A. That one that you have there on the floor, that is in two pieces.

Mr. Fulwider: Exhibit F.

Q. By Mr. Jamieson: What did you call it there at that time?

A. I don't remember what we called it.

Q. Can you describe it from your memory, without looking at it and saying it was something like they have shown to you today?

A. Yes.

Q. Will you do so?

A. It would be a cylinder that would have room inside of it for a float and then for a cap on the top, that bolted together at approximately the center, and probably fastened together with five-eighths bolts.

Q. What was inside of the cap?

A. I wouldn't know.

Q. Do you remember what was on top of the cap?

A. No; I don't recollect right off the bat. I don't know.

Q. I want what you remember.

A. Well, I don't remember.

Q. Do you remember what was below the cap?

A. No. [209]

Q. Do you remember what was to the side of the cap?

A. No; I don't.

(Testimony of Erle J. Brown)

Q. Do you remember what the cap—or the function it performed?

A. If I have to give the answer from memory, I can't, but, if I do from my knowledge, I can answer.

Q. I want to know what you remember about it.

The Court: If you know what it was, it shows that your recollection is good.

A. I don't remember whether I got my ideas on it or my knowledge of it from what I saw then or from what I have seen since as to the assembly that they have there, the float that it is carried in. We have floats in steam traps, gas traps and water traps like that. So a float assembly is nothing new.

Q. Br Mr. Jamieson: So you don't remember the details of that particular assembly that you have described, from memory, do you?

A. Well, yes.

Q. Then, will you describe them? There was a cap, and what else was there?

A. Well, there were openings for pipefittings. [210]

Q. Where were those fittings or those openings?

A. Common sense would tell me there would be one on top and one on the bottom, but I don't remember whether—

Q. You don't remember what they looked like?

A. No; I don't.

Q. Do you remember what work they did, what function they performed.

A. Why, yes.

Q. What function did the pipe perform?

A. The pipe was to carry water from the boiler.

(Testimony of Erle J. Brown)

Q. What did it carry it for?

A. To get it up into a position where it could operate the float.

Q. Was the float operated by water?

A. It could have been or could have been operated by steam.

Q. Well, which was it? Do you know?

A. Yes. It was operated by water when there was sufficient water there to operate it.

Q. Do you know whether there was a valve in it?

A. No; I don't know.

Q. Do you know whether there were any arms on the valve?

A. Are we still talking about that assembly down there?

Q. I am talking about the one that you say was so in- [211] stalled down there at the company that you were employed by, on the date that you mentioned on direct, that particular installation.

A. Do you mean that part of the installation?

Q. I don't care about these drawings but I want to know what you remember of your own memory of what was constructed down there at the Continental Oil Company lease, I think you said, prior to 1933. I want to know what parts you can remember of your own independent memory and what they did.

A. I wish I knew just exactly what you want me to give you.

The Court: He is trying to test your recollection to see if you remember the device that you said you knew of at that time; that is all.

A. That is asking an awful lot of memory.

(Testimony of Erle J. Brown)

The Court: He is not trying to show that you remember. He is trying to show that you don't remember. He is cross examining you.

Mr. Jamieson: I don't think anybody could remember that long and that is why I am asking these questions.

A. I have installed many such gadgets since, doing the same job.

The Court: Prior to what date?

A. Well, it has been my work since 1926. [212]

The Court: What is the nearest date of which you have a very distinct recollection so that you can remember the details on this particular device? What is the earliest date?

A. That goes back to 1932, from 1932 to 1933; the latter part of 1932. That is tied in to the explosion of that boiler because I know that Mr. Van Slack was there when we put on the device.

Q. By Mr. Jamieson: Did you make any other installation besides that one single one you testified about?

A. No.

Q. When was the next installation you made after that of any Pinkerton equipment?

A. I didn't install any other after that.

Q. That is the only one you have ever installed in your whole life? A. Yes.

The Court: He has answered three or four times. Please don't repeat the question.

A. But I have seen others.

Q. By Mr. Jamieson: Have you seen others that were installed?

A. After they were installed; yes.

(Testimony of Erle J. Brown)

Q. When did you next see one after it was installed?

A. There was one up in the San Joaquin Valley on a set of boilers up there. [213]

Q. When? A. In 1939 or 1940.

Q. So that you saw only one from this first one until the one you saw in 1939, is that right?

A. That is right.

Q. Going back to the first one that you helped install in 1933, what else do you remember about the construction of it, if anything? What other parts did it have in it?

A. In addition to the ordinary piping and things that go with it?

Q. In addition to the cup and pipe, and what else did you have?

A. There was a manifold or tube running up fastening to the steam manifold up on top of the boilers, and to that a piston-operated gadget, I believe, that fastened itself to a whistle.

Q. There were no valves it it, were there?

A. I wouldn't remember that.

Q. There was no hand mechanism to operate, was there?

A. I wouldn't remember that, either.

Q. There was no manual release?

A. No; I wouldn't remember that.

Q. There were no slots in the valve stem?

A. I didn't see that. [214]

Q. There was no diaphragm in it?

A. I wouldn't remember.

Q. There was no leather cup or packing? You wouldn't remember that?

(Testimony of Erle J. Brown)

A. Why, no. A construction crew doesn't get into those details if it is not part of their work.

Mr. Jamieson: All right, that is all.

Redirect Examination

Q. By Mr. Fulwider: Will you tell us what you do remember, without respect to these models? Particularly, what was there and how did it operate?

A. It was just one of those jobs that is given you to do. Pinkerton was there to supervise it and I was there to control the men and have them do what was needed to be done. He said, "We are going to do this and do it this way and that way." We were particularly and chiefly concerned with the manual work that went with the installation of it. Curiosity perhaps prompted some of us to delve into some of these but very little.

Q. That apparatus that you did install, or assist Mr. Pinkerton in installing, looking at it from the outside, what did it comprise and what did it do?

A. I would say you could call it about three-part mechanism, operated with a float device, or the central part of the mechanism close to the boiler, with pipe running from [215] that to the boiler, to the water chambers in the boiler, one on the side and one on the top; and from that there was piping ran down to the control valve that was put on the fuel gas line. I don't remember whether that went to each individual boiler or whether it went to the master line. That is fairly, that is, definitely, hazy. We have changed our method of installing piping and fuel gas going into the boiler several times since then, and I don't remember what that was like since then.

Q. Was there a whistle in connection with it?

(Testimony of Erle J. Brown)

A. There was. I can remember I heard it.

Q. How long did that installation operate there at Seal Beach, to your knowledge?

A. I really don't know. As I have a recollection, the plant was changed within a year or a year and a half after that was put in. We moved the dehydrolater plant where this was.

Q. Did work up until the time you moved the dehydrolater plant?

A. So far as I know.

Mr. Fulwider: That is all.

Re-cross Examination

Q. By Mr. Jamieson: Did you ever hear the whistle blow? When you say it worked, as far as you know, what did it do? [216]

A. Well, what does a whistle do when it blows?

The Court: Describe it for the record.

Q. By Mr. Jamieson. Did you ever run low on water and have to use this equipment?

A. No; not to my knowledge.

Q. So you never heard the whistle blow?

A. Yes; we tested it. But it never worked during the time I was there.

Q. In actual operation, did it?

A. It could have but I wasn't there.

Q. You didn't hear it operate?

A. I wasn't there.

Q. It might have been a complete failure, might it not?

The Court: That is a conclusion. Ask him if it worked.

Mr. Jamieson: There is a difference between testing and actually working if the fuel gas line—

(Testimony of Erle J. Brown)

The Court: But you are asking for a conclusion or whether there was a failure or not.

A. We developed a condition right after—

Q. By Mr. Jamieson: Did you see it in operation afterwards?

A. We developed a condition after we had installed it that made the whistle work.

Q. What was that condition? [217]

A. We lowered the water in the boiler.

Q. When the whistle worked, did the fuel shut off at the same time?

A. It was supposed to shut off at the same time.

Q. Do you know whether it did or didn't?

A. I don't know now; no.

Q. Do you know whether the company ever had another one installed like that? A. I don't know.

Q. Do you know whether they abandoned it?

A. I don't know.

Q. Did you ever see it operate other than the time you lowered the water? A. Oh, yes.

Q. Did you ever see it operate, I mean?

A. Oh, yes; it was on the boilers.

Q. Did you ever hear the whistle blow after that?

A. No.

Mr. Jamieson: All right, that is all.

Redirect Examination

Q. By Mr. Fulwider: Was it purchased by the Continental Oil Company, the installation?

A. I wouldn't know that or not.

Mr. Fulwider: I think that is all. Mr. Thornton. [218]

C. A. THORNTON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Court: How about introducing the prior art? Have you got it in your book?

Mr. Fulwider: Yes; I have. I was going to introduce it but I wanted to discuss it.

The Court: Introduce it and then I will set a time for the argument, when it can be disposed of. You can put them in as a part of the record.

Direct Examination

The Clerk: What is your name, please?

A. C. A. Thornton.

The Clerk: And what is your full first name?

A. Cecil.

Q. By Mr. Fulwider: What is your address, Mr. Thornton?

A. 382 Morrell Park.

Q. By whom are you employed now?

A. The Continental Oil Company.

Q. When did you start to work for the Continental Oil Company?

A. In 1931.

Q. Did you ever work at a lease of the Continental at Seal Beach? [219]

A. Yes.

Q. Commencing when?

A. The first week in January in 1932.

Q. And are you still there at Seal Beach?

A. I am still there at Seal Beach.

Q. What were your duties, in 1932, at Seal Beach?

A. In 1932, I was a roustabout, working for Mr. Brown.

Q. Mr. Brown who has just testified?

A. Yes, sir.

(Testimony of C. A. Thornton)

Q. Do you recall whether or not a Pinkerton alarm and fuel valve shut-off was ever installed at the Continental lease at Seal Beach?

A. Well, I believe this same alarm system is the same one that we installed in, I think it must have been, after July. I was down there about six months working for Mr. Brown.

Mr. Jamieson: Could I ask, if there are any other witnesses that are going to testify to this, that they be excluded?

The Court: Oh, no.

A. And that is the system that we worked on there or installed there. It was some time between July in 1932 and the earthquake. I don't remember just the exact date but it was in there somewhere.

Q. By Mr. Fulwider: By the "earthquake," do you mean [220] the earthquake in 1933?

A. March 10, 1933.

Q. How do you fix that July date?

A. We had a boiler explosion there; also, I had been down there about six months on that lease.

Q. Who was superintendent of the Seal Beach lease when you were there in 1932 and '3?

A. Van Slack.

Q. Do you remember his first name?

A. All we ever called him was Van. That is all I remember.

Q. Can you tell me approximately when he died?

A. February 25, 1933, just before the earthquake.

Q. Can you describe for me the Pinkerton apparatus that was installed during that period between July, 1932

(Testimony of C. A. Thornton)

and March 10, 1933? Describe it to me in your own words, to the best of your recollection.

A. I never went into it or anything like that. We installed hundreds of things down there, or wanted everything that came along. But this is not our business and a lot of them don't want you to peer into their things. Any time we have a pump or something like that, it goes back to the shop when something is wrong, or the Pinkerton water regulator—we call up Mr. Pinkerton and that is fixed and goes into the shop. But I remember installing it there and the operation [221] of it; that your float valve on the side—

Q. On the side of the boiler?

A. Yes; and your water connection we drilled in the side down here for your float regulator here, and then your shut-off valve on your fire box and your whistle valve, and then there was a little steam heater line and your two valves to bleed your lines, and then I believe there was a globe gate down on the bottom on that one.

Q. What was that for?

A. To close off. I believe we put that on there to close off there the gas and steam there.

Q. What happened when the water in the boiler became low, too low?

A. Well, your float valve and your needle valve in there will not let steam pressure come in and, of course, your bottom regulator would close off the pressure on that type of valve, and the other one was reversed and would open it and the whistle at the same time.

(Testimony of C. A. Thornton)

Q. The bottom regulator you mentioned—was that the fuel valve?

A. That is the fuel valve going into your fire box and your top valve is your whistle valve. When the water level went down in your boiler, then that opened that jet and put that pressure in there.

Q. Do you have any independent recollection as to [222] whether or not the apparatus that you installed there at Seal Beach—or in that apparatus the fuel valve was similar to this Exhibit E here in front of you?

A. I wouldn't know by looking at the valve. As I say, I never tore into them. All I know is the way it operated and these look similar to me, as I remember. That has been quite a while ago.

Q. Did you ever have occasion to go into the piston assembly that operated the fuel valve, to see what that piston was like or how it was operated?

A. No; I didn't.

Q. You didn't take it apart?

A. No. That wouldn't be anything for me to do.

Q. How long, to your knowledge, was that Pinkerton installation at Seal Beach continued in operation?

A. It was in operation until we changed over and built the new plant some time in probably 1935 or 1936, somewhere in there.

Q. Did you ever test the installation to see if it functioned properly? A. I didn't test it.

Q. Did you ever hear or see it tested by others?

A. Yes; Mr. Brown did.

Mr. Jamieson: That is objected to as hearsay unless you saw him. [223]

(Testimony of C. A. Thornton)

Q. By Mr. Fulwider: Did you see him test it?

A. Yes. I was working right with him all the time.

Q. You were his assistant, were you not?

A. There were about four or five of us in the crew.

Mr. Fulwider: I think that is all.

Cross-Examination

Q. By Mr. Jamieson: You were working for Mr. Brown, at the time, as his assistant?

A. That is right.

Q. And you just did what he told you to do?

A. That is right.

Q. You did no more about the job than he did, did you?

A. Well, that could be possible, too, at times. I don't say I did in this case but in some cases. It was new to him and new to me.

Q. It was new to you and new to him?

A. Yes.

Q. Do you remember the testing of the valve?

A. Yes; I recollect that, I believe, where we blew off the boiler and lowered down there to try it out. We usually do that.

Q. Did you hear the whistle blow? A. Yes.

Q. And you saw the fuel shut-off valve work, did you? A. I don't remember right now. [224]

Q. Do you know whether it worked or not?

A. It must have worked all right.

Q. Do you remember seeing it work?

A. I don't remember looking in and seeing it shut off.

Q. You don't know whether the fires were shut off by it? A. No.

(Testimony of C. A. Thornton)

Q. Do you know whether they were shut off simultaneously or in any other way?

A. I don't know whether they closed it off manually or what, or afterwards, or what.

Q. Do you know what means was in that mechanism to cause the whistle to blow?

A. Do you mean in your float valve on the side?

Q. Do you know whether the train of mechanism—

A. I imagine—

Q. Do you know?

A. —if your water level went down, your steam pressure worked the valves.

Q. Do you know what the valves looked like? Did you see them at that time?

A. Yes; I seen the valves, this installation.

Q. Did you install the valves at Seal Beach?

A. Yes.

Q. What did they look like? Can you describe it with- [225] out referring to any exhibit?

A. They looked something like this valve.

Q. Which one? A. Here; the shut-off valve.

Mr. Fulwider: Exhibit E.

A. And we had a float like there and a chamber.

Mr. Fulwider: Exhibit F.

Q. By Mr. Jamieson: Do you know whether it had a non-return means in it, connected to the chamber?

A. A return from this valve back to the chamber?

Q. Yes.

A. It only had two valves up on top and then that copper tubing down to it.

Q. It didn't have any manual release on that chamber, did it? A. Yes.

(Testimony of C. A. Thornton)

Q. Where? A. On the top.

Q. On the top of the chamber?

A. I believe we had a globe valve here and then I believe there was a pulley or something on that.

Mr. Fulwider: By "here," describe it in words. That is Exhibit E you just pointed to.

Q. By Mr. Jamieson: Do you know what the valves looked like? [226]

A. Well, as far as I can remember, this looks like the bottom shut-off valve, your gas valve.

Q. I was referring to the valves that actuated the whistle. Do you know what they looked like?

A. Well, as I remember, it is a valve something like this, with just a whistle on it.

Q. What did the valve that operated the whistle look like?

A. As far as I remember, it looked something like this valve right here. I don't see—

Q. You say it looks like Exhibit E. Will Exhibit E blow a whistle?

A. No; that won't blow a whistle but I say it was a valve something like that, with a whistle attachment to it, that operated probably reverse to that.

Q. Do you know whether the valve had a valve stem on it? A. Well, I don't remember.

Q. Do you remember whether there were any slots in the valve stem?

A. No; I don't remember how it was made that way.

Q. Do you know whether it had one or two valves?

A. No; I don't know.

Q. When you changed the plant, did they throw away this installation? [227]

(Testimony of C. A. Thornton)

A. I don't know. I wasn't working there at that time.

Q. When was the next time that you saw a Pinkerton valve. A. The next time from what?

Q. From that installation?

A. Do you mean in July?

Q. Yes; when you saw another one.

A. I believe they had one over there on the Standard lease.

Q. When?

A. I think it was about 1934 or 1935. I heard the whistle blowing.

Q. But there was no fuel shut-off on the Standard lease, was there? A. I don't know.

Q. When was the next time you saw a fuel shut-off Pinkerton valve?

A. I haven't seen any, only the one we had right there.

Q. You never saw one after that? A. No.

Q. And your company never installed any more after that?

A. I don't know. They might have installed hundreds [228] of them.

Q. You didn't see any? A. No.

Mr. Jamieson: That is all.

Redirect Examination

Q. By Mr. Fulwider: Mr. Jamieson asked about the release valve and the witness pointed to this top here. There was this bleed valve, was there? A. Yes.

Mr. Fulwider: That is all. We will call Mr. Dollarhide.

RUSSELL A. DOLLARHIDE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. Russell A. Dollarhide.

The Court: We have worked pretty long hours. Unless you want to get rid of this witness, I would just as soon continue this matter because we can't conclude tonight.

Mr. Fulwider: This happens to be his day off.

The Court: All right. Let's finish.

The Clerk: What is your name?

A. Russell A. Dollarhide.

Direct Examination

Q. By Mr. Fulwider: Mr. Dollarhide, by whom are you employed now? [229]

A. The Continental Oil Company.

Q. When did you go to work for the Continental Oil Company? A. The 25th of August in 1926.

Q. Did you ever work at the Seal Beach lease?

A. Yes, sir.

Q. During what years?

A. I have been there ever since and am still there.

Q. Since 1926? A. Yes, sir.

Q. Can you tell me whether or not a Pinkerton low water alarm and fuel shut-off system was ever installed at the Continental lease at Seal Beach?

A. Yes, sir; it was.

Q. Can you tell me when it was installed?

A. Well, some time between July in 1932 and the 25th of February, 1933.

(Testimony of Russell A. Dollarhide)

Q. How do you fix those dates?

A. Well, a boiler blew up along about the 1st of July in 1932 and our superintendent Van Slack died the 25th of February, 1933.

Q. And you fix the date of the Pinkerton installation as being some time between those two dates?

A. Van Slack was superintendent at the time it was installed. [230]

Q. Can you tell me what that Pinkerton alarm system—or, first, what were your duties at the lease at that time when the alarm system was installed?

A. I was the dehydrator operator.

Q. Was it the boiler of the dehydrating plant upon which the Pinkerton system was placed?

A. Yes, sir.

Q. When you were operating it? A. Yes, sir.

Q. Can you tell us briefly how that Pinkerton installation worked or what it comprised and what it did?

A. Well, it was comprised of a float valve and a fuel valve and a whistle valve.

Q. Where was the float located?

A. Up near the side of the boiler.

Q. Was it in a separate float chamber?

A. Yes, sir.

Q. Was the float chamber connected to the water and the system—

Mr. Jamieson: I object to that as leading and suggestive.

Q. By Mr. Fulwider: How was it connected?

A. It was connected with an inch line from the top of the boiler, of the float valve, and an inch line from the top of the boiler to the top—[231]

(Testimony of Russell A. Dollarhide)

Q. What lines led from the fuel valve housing?

A. There was copper tubing led up to the manifold, across the top of the boiler to the whistle valve and another tubing ran to the top of the fuel valve.

Q. What happened when the water got low and the float went down a certain amount?

A. The whistle would blow and the fuel valve would shut off.

Q. Do you know whether or not the fuel valve was piston-operated, that is, did it have a piston connected with the valve stem?

Mr. Jamieson: That is objected to as leading and suggestive.

The Court: No.

Mr. Jamieson: Can't he tell what he remembers of it?

Q. By Mr. Fulwider: Tell us how the fuel valve was operated.

A. It operated from a piston, from the top of the body of the valve.

Q. And the top of the piston—was that connected to the steam line you mentioned? A. Yes, sir.

Q. Did you ever look inside of the float valve assembly to see what the valves were like?

A. No; I didn't. If anything got wrong, we just called [232] Pinkerton.

Q. You are acquainted with Mr. Brown and Mr. Thornton? A. Yes, sir.

Mr. Fulwider: That is all.

(Testimony of Russell A. Dollarhide)

Cross-Examination

Q. By Mr. Jamieson: Mr. Dollarhide, are you connected with Mr. Pinkerton in any way?

A. No, sir.

Q. You are still working for the Continental?

A. Yes, sir.

Q. What were you doing at the time of this installation?

A. I was a dehydrator operator, operating the dehydrating plant and also caring for the boiler plant.

Q. Did you have anything to do with this Pinkerton equipment?

A. Yes, sir.

Q. Were you there when it was installed on this—do you know what the parts were?

A. No more than after they were installed.

Q. Were you there all the time they were being installed?

A. Yes, sir.

Q. Can you tell us in your own words what you saw?

A. Brown was pusher of the roustabout gang and the [233] pipefitting gang and they had him install the valves and the whistle.

Q. Were you there all the time they were installing them?

A. Yes, sir.

Q. What were the parts you saw?

A. The fuel valve.

Q. What did the fuel valve look like?

A. It resembled this valve.

(Testimony of Russell A. Dollarhide)

Q. Without looking at this, according to your own memory, what do you remember?

A. It had a casting at the bottom and was connected with a brass cylinder on the top, with a stem down through the center.

Q. What was inside of the brass—

A. I wouldn't know.

Q. What did the stem down the center look like?

A. There is parts you could see. It was just brass—or just a rod.

Q. Did you see what the inside looked like?

A. No; I did not.

Q. Did you see what the valve looked like that operated the shut-off valve?

A. Just the regular valve like what was described.

Q. Can you describe it? [234]

A. It had a brass cylinder on top and a casting and the stem down through and I think it was operated from a piston.

Q. Was there a leather cup? A. No.

Q. Was there more than one valve in it to operate it?

A. I wouldn't know.

Q. Do you know whether there were any stems on the valves?

Mr. Fulwider: Which valves?

(Testimony of Russell A. Dollarhide)

Mr. Jamieson: That operated the whistle and the shut-off valve. A. I wouldn't know.

Q. Do you know whether there were any slots in the valve? A. I would not know that, either.

Q. Do you know whether there was any manual release?

A. There was a manual release just on top of the fuel valve and also up near the float valve.

Q. Do you know whether there was any shut-off means to prevent the pressure in the valve returning to the place from which it came?

A. Steam pressure?

Q. Yes. A. I don't remember. [235]

Q. Do you know where the steam pressure came from?

A. It came from the top of the boiler.

Q. How did it get from the top of the boiler?

A. It came from an inch line.

Q. A straight inch line?

A. It had an "L" in it.

Q. There was a line from the top of the boiler to the top of the valve, is that right?

A. It consisted of an inch line and a needle and "L" and down into the float valve.

(Testimony of Russell A. Dollarhide)

Q. In other words, there was a straight line connection from the top of the boiler to the top of the fuel shut-off valve? I mean there was nothing in the line?

A. Not that I know of.

Q. Was there any thermostat on it?

A. I wouldn't know.

Q. Did you see the inside of any of the mechanism?

A. No.

Mr. Jamieson: That is all.

Redirect Examination

Q. By Mr. Fulwider: How long did that installation operate at Seal Beach, if you know?

A. Until the plant was torn down.

Q. How long was that?

A. I would say until 1935. [236]

Mr. Fulwider: That is all.

Recross-Examination

Q. By Mr. Jamieson: When was the next time you saw a Pinkerton shut-off valve? A. I wouldn't know.

Q. In 1939?

A. I don't know.

Q. In 1940?

A. I wouldn't remember.

Q. Did you ever see one?

A. I don't know as I have in operation. I don't get out around the plant.

Mr. Fulwider: That is all. The rest of our case is just the art and Mr. Pinkerton we would like to put on, not tonight, who will correlate all of this corroborating testimony that has come in today.

The Court: All right.

Mr. Fulwider: Shall I at this time offer the book of patents?

The Court: Yes.

Mr. Fulwider: I would like to offer the book of patents as the defendant's next exhibit.

The Court: Are these the ones that are pleaded?

Mr. Fulwider: That is right, plus a few additional prior art patents which we found afterwards and which Mr. Jamieson [237] is advised of and which are in there to show the state of the art and not as anticipation.

The Court: It may be admitted.

The Clerk: Defendant's Exhibit I in evidence.

The Court: What is your best reference out of all of those?

Mr. Fulwider: It is two patents in suit. The best reference is the patent that ends with -925 or -395 is the patent to Parker. That will be the first one in the book. And the best reference—or it is our position that that alone is a complete anticipation. And then I will call your Honor's attention particularly to the Sutherland patent, which shows a fuel valve almost identical with the one Pinkerton was using.

Mr. Fulwider: Yes; it is pleaded.

The Court: Sutherland is not pleaded?

The Court: No; I don't see it.

Mr. Jamieson: Is Parker pleaded?

Mr. Fulwider: Yes. There are three for the fuel valve, Sutherland and Horridge.

They are in order. And then as to the valve patent, your Honor, our best reference is the patent to Baldwin, as to the complete valve assembly; and, also, the patent to Wright, which is equally good. We really have two best references. [238]

The Court: All right.

Mr. Fulwider: I want to put the file wrappers in because I particularly wish to discuss them in the argument.

The Court: All right.

Mr. Fulwider: We will put the one for the -395 patent in first; next, the file wrapper on -2233—

The Clerk: Defendant's Exhibit J in evidence.

Mr. Fulwider: And this is on the valve patent.

The Clerk: Defendant's Exhibit K in evidence.

[Endorsed]: Filed Jul. 13, 1948. Edmund L. Smith, Clerk. [239]

[Title of District Court and Cause]

Honorable Leon R. Yankwich, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, April 5, 1948

Appearances:

For the Plaintiff: Hamer H. Jamieson, Esq., Security Building, Los Angeles, California.

For the Defendant: Robert W. Fulwider, Esq., 5225 Wilshire Blvd., Los Angeles, California. [243]

* * * * *

KENNETH FAY,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Kenneth Fay.

Direct Examination

By Mr. Fulwider:

Q. Are you acquainted with Mr. Pinkerton, the defendant in this case? A. Yes, I am.

Q. Can you tell us approximately when and under what circumstances you became acquainted with Mr. Pinkerton? [244]

A. I believe it was around May of 1944. Mr. Pinkerton came in to see me at my company. I was associated with Crane Company at the time as an industrial engineer, and he submitted a sketch of a fabricated assembly that he wanted to see if I could make for him

(Testimony of Kenneth Fay)

with our facilities at the shop, and after considering it we made three samples from that sketch, and later we went into further production, and for our records, naturally, I made a drawing of the proposed assembly myself.

The Court: Did you say it was '34 or '44?

The Witness: '44.

Mr. Fulwider: Will you mark this for identification, please?

The Clerk: Defendants' Exhibit L, for identification.

(The diagram referred to was marked Defendants' Exhibit L, for identification.)

Q. By Mr. Fulwider: I show you here a blueprint, Mr. Fay, Exhibit L; can you tell me what that blueprint shows and who it was made by?

A. Well, it shows my sketch of the fabrication as submitted by Mr. Pinkerton.

Q. I notice it carries the name "K. Fay"; is that your printing? A. That's right.

Q. It is drawing No. C 166, dated 6-7-44? [245]

A. That's right.

Q. Is that likewise your printing? A. Yes.

Q. Is that the drawing you mentioned as having been made for Mr. Pinkerton about that date?

A. That's right.

Mr. Fulwider: Will you mark this group here together as the next exhibit?

(Testimony of Kenneth Fay)

The Clerk: Defendants' Exhibit M, for identification.

(Group of papers referred to was marked Defendants' Exhibit M, for identification.)

Q. By Mr. Fulwider: I show you here a group of sales slips, some of them delivery slips, perhaps—maybe you can tell me what they are—that have “Crane Company” printed at the top. Can you tell me what those are, the ones that have “Crane Company” and what the items there represent?

A. Well, this quantity here of three four-inch extra heavy seamless pipe water alarms, as per sketch, this is the cash receipt, this was drawn up by the cashier.

Q. That is dated 5-12-44?

A. That's right. I think this was one of the first ones we made.

Q. That is what you call a cash receipt slip, is that it?

A. That's right, sir. It is marked “Paid” by Bill Donis. The others are all the same, only the quantities [246] vary. Some of them are six, some of them a quantity of 10. Here is a quantity of seven.

Q. I call your attention particularly to this cash sale sheet, No. 6001, which says “Per Crane drawing C 166”; would that be this drawing or some other?

A. That is right, the same drawing. We have to mark all our sketches with a specification number.

Q. Did you have anything to do with the supervision or fabrication, or the delivery of these parts to Mr. Pinkerton?

(Testimony of Kenneth Fay)

A. Yes. Any orders that I handled, why, I made the sketches and supervised the fabrication, and also arranged for the delivery.

Q. Were the parts that Crane made for Mr. Pinkerton made in accordance with this drawing?

A. Right from this drawing.

Q. That is a shop drawing, is it?

A. That's right.

Q. Do you recall independently about how long your company was making parts—what shall we call these, bodies? A. Yes.

Q. (Continuing)—for Mr. Pinkerton in accordance with this, or do you have any such recollection?

A. It must have been for a year, at least, over a year; I can't remember exactly.

Q. Are you still with the Crane Company? [247]

A. No; I am with another company.

Q. When did you leave the Crane Company?

A. 1945, in September.

Mr. Fulwider: Thank you. You may cross examine.

Mr. Jamieson: ' No cross examination.

The Court: All right.

Mr. Fulwider: You may step down. Thank you, Mr. Fay.

(Witness excused.)

Mr. Fulwider: I would like to call Mr. Correze.

I may say this testimony goes to the plug type valve assembly that was made for a short time during the war. We want to establish when that form was started and approximately when it was finished.

STANLEY L. CORREZE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Stanley L. Correze.

Direct Examination

By Mr. Fulwider:

Q. Mr. Correze, have you ever been employed by Mr. Pinkerton? A. Yes, I have.

Q. Can you tell me approximately when you started in [248] his employ? A. The middle of 1936.

Q. How long did you stay with him in his employ?

A. Until the first part of 1944.

Q. 1944? A. '42. Pardon me.

Q. What were your duties while you were with Mr. Pinkerton? A. Machinist in charge of the shop.

Q. I call your attention to these two exhibits, E and F, here on the floor before you; have you ever seen any devices similar to those? A. Which is "E"?

Q. "E" is the valve and "F" is the alarm body.

A. Yes, I have.

Q. Will you tell me whether or not Mr. Pinkerton had any of those in his shop when you came to work for him in 1936? A. Yes, he did.

Q. Can you tell me about how many, or do you have a recollection on that?

A. Well, I would say approximately 50 of the cast iron casting there, the low water alarm.

Q. The alarm bodies?

A. Yes, the bodies. [249]

(Testimony of Stanley L. Correze)

Q. That is Exhibit F. This one here?

A. Yes.

Q. That is Exhibit F.

A. I would say about the same of the other, the fuel shutoff valve.

Q. The valve, Exhibit E. A. Exhibit E.

Q. Were they assembled or disassembled?

A. Assembled.

Q. Were any of those castings or parts, Exhibits E or F, manufactured by Mr. Pinkerton in his shop while you were in his employ? When I say "manufactured" I mean were any of them made in addition to the inventory he had on hand then. A. Yes; a few.

Q. Do you recall whether or not the valves, Exhibit E, were delivered with a relief cock or fitting either attached or loose for attachment when they were sent out of the shop? A. No.

Q. Do you remember whether or not there was a fitting similar to this small one here that had a bleed in it, a small bleed hole that screwed into the top of the valve?

Mr. Jamieson: That is objected to as indefinite and not referring to any particular device.

Mr. Fulwider: There is a fitting here (indicating). [250]

Mr. Jamieson: I am not referring to that; I am referring to the ones you are asking about in your question.

Q. By Mr. Fulwider: There is a small fitting there which has a bleed hole; do you recall whether or not any of those early valve assemblies that were sold while you were working for Mr. Pinkerton went out with fittings like that? A. No, I don't.

(Testimony of Stanley L. Correze)

Q. You don't remember? A. No.

Q. Will you take a good look at this valve while you have got it here, and tell me whether or not you are positive, if you are, that that is one of the valves that was made or identical with the valve that was made while you were in Mr. Pinkerton's employ?

A. Yes, it is.

Q. Will you step down for a minute, please, and take a good look at this alarm body, Exhibit F, and tell me whether or not that is identical, or if not how different from alarm bodies and floats that were manufactured and were on hand when you were with Mr. Pinkerton?

A. It is identical.

Q. Now, I will call your attention—you can resume your seat now—to a plug, Plaintiff's Exhibit 12; were any of these plugs—I will put it this way: Did you ever see a plug fitting similar to that prior to leaving Mr. [251] Pinkerton's employ in 1942?

A. No, I didn't.

Q. To your knowledge was such a plug ever manufactured in Mr. Pinkerton's shop prior to your leaving in 1942? A. No.

Q. If such a plug had been made would you have known about it? A. Absolutely.

Q. Did Mr. Pinkerton have any other shops during that time? A. No.

Q. After leaving Mr. Pinkerton in 1942 did you ever work for him again? A. Yes, again in 1944.

Q. Can you tell me approximately what date, when you started?

A. Approximately August or September I started, and continued to the following April, I believe, or May.

(Testimony of Stanley L. Correze)

Q. When you came back to work for Mr. Pinkerton in 1944 what type of alarm body valve mechanism was he then manufacturing?

A. This type here (indicating).

Q. That is this plug, Exhibit 12? A. Yes.

Q. I show you this drawing, blueprint, Exhibit L; have [252] you ever seen that print or one identical with it before? A. Yes, I have.

Q. Can you tell me what it portrays?

A. It is the fabrication, welded fabrication of an alarm body.

Q. Does that have any relationship to this plug, Exhibit 12? A. It does.

Q. Can you tell me what it is.

A. It screws into the side flange.

Q. That is, the plug screws into the side flange?

A. Yes, which is the operating mechanism in conjunction with a float which operates the low water alarm and fuel cutoff valve.

Q. Do you know whether or not this alarm body shown by Exhibit L was the alarm body sold by Mr. Pinkerton for awhile with these plug assemblies, in them?

A. Will you please repeat that?

Mr. Fulwider: Read the question.

(The question was read by the reporter.)

The Witness: That's right.

Q. By Mr. Fulwider: That was after your return to his employ in 1944? A. That is correct.

Mr. Fulwider: That is all. [253]

The Court: Cross examine.

Mr. Fulwider; Pardon me, please.

(Testimony of Stanley L. Correze)

Q. By Mr. Fulwider: Mr. Correze, did you have any contact with the working drawings and assembly drawings which Mr. Pinkerton had in his shop at the time you came to work for him, relative to these low pressure alarm bodies and valve assemblies?

A. Well, I saw the drawings, but I had nothing to do with the making of them.

Q. I would like to show you these drawings and see if they are familiar to you. Here is a drawing, Exhibit F-3, it is dated 12-14-34. Can you tell me whether or not you have ever seen that before?

A. Yes, I have seen this drawing.

Q. When and where?

A. Well, that was during the period of time I worked for Mr. Pinkerton between 1936 and '42.

Q. Do you remember whether or not it was there when you went to work for him?

A. Well, I suppose it was, because I saw it, and I don't remember him bringing it there. I had nothing to do with making the drawing.

Q. I understand that.

A. The drawing is familiar to me.

Q. Did you ever make any drawings for Mr. Pinkerton? [254]

A. Yes, I have.

Q. Did you make many or few drawings while you were there?

A. I made quite a few.

Q. Did he have anyone else make drawings, as far as you know, while you were in his employ?

A. Yes.

Q. He did have some?

A. Yes.

Q. I show you another drawing here, Exhibit E-2; can you tell us whether or not that is familiar to you?

A. It is.

(Testimony of Stanley L. Correze)

Q. Can you say whether or not you saw it soon after your employment?

A. Yes, I did, I remember seeing this. This was the manufactured part I was speaking of.

Q. And those drawings were kept in the Pinkerton shop, were they? A. Yes.

Q. Here is an assembly drawing or schematic installation drawing, rather, Exhibit H; have you ever seen that before? A. I have.

Q. Under what circumstances and about when?

A. This drawing I saw very soon after I went to work [255] for him, because I believe this is one that was used in part of his literature of installation of the low water alarm and fuel cutoff valve.

Q. I believe you examined these photos just before court convened. Will you tell me to the best of your knowledge as a mechanic who worked for Mr. Pinkerton for some six years what this construction is on the alarm body, or what it appears to be to you? And if you wish any aid I have a glass here.

A. You mean this added?

Q. Yes. Tell us from what you can see from the photo what that bracket is and describe that assembly.

A. From what I can see, somebody other than myself or anybody connected with the Pinkerton—

Mr. Jamieson: We move to strike that as a conclusion.

The Court: Strike that out. He is asking you what that is.

The Witness: It is a flange added to the existing flange of the Pinkerton low water alarm.

(Testimony of Stanley L. Correze)

Mr. Jamieson: We move to strike that as a conclusion of the witness.

The Court: No. That is a description.

Mr. Jamieson: He says a flange added to the Pinkerton construction.

The Court: You may cross examine him about it later. [256] He has testified that he knows the construction, and this is an addition to it.

Mr. Jamieson: I will withdraw the objection. I will cross examine him about it.

The Court: Go ahead.

Q. By Mr. Fulwider: In your opinion, with your experience with regard to these valves, do you now think that was made?

Mr. Jamieson: We object to it. No foundation laid.

Mr. Fulwider: I think he is an expert as far as this thing goes. He worked with Mr. Pinkerton for six years. Nobody knew the alarms any better than he.

The Court: I do not think he can express his opinion on it. He can express his knowledge if he saw it made.

Mr. Fulwider: It is a little hard to tell from those photographs, and he has looked at them, and I would like to have him state what the photograph shows to him.

The Court: That is all right.

Q. By Mr. Fulwider: Will you tell what the photograph shows to you as to the construction of that bracket and the two plugs on the sides?

A. Well, as to the construction, the original flange that is on the side of the low water alarm has been machined off for some reason, and a new flange made and bolted on, that is, with studs, that has some type of [257] bleed on the side and a whistle and a fuel valve

(Testimony of Stanley L. Correze)

connection. I can't understand why anybody would go to such an amount of trouble to make such a connection.

Mr. Jamieson: I move to strike that as a conclusion, speculation of the witness.

The Court: It is a description. He is a mechanic. He is describing a device.

Mr. Jamieson: All right.

Q. By Mr. Fulwider: Did you ever, during your employment with Mr. Pinkerton, put out a structure like that in the photograph? A. No, sir.

Q. Did you ever see a structure like that in the photograph? A. No, sir.

Q. Did you ever see a Pinkerton structure that had two small, what seemed to be ports, radial ports, out to the side, which appear to be plugged or have bleeds in them? A. No, sir.

Mr. Fulwider: That is all. Cross examine.

Cross-Examination

By Mr. Jamieson: ,

Q. Mr. Correze, where are you working now?

A. Page Oil Tool, Incorporated.

Q. What are you doing for them? [258]

A. Machinist.

Q. When you were working for Mr. Pinkerton were you familiar with all of the structures that he made during the two periods that you have mentioned?

A. Yes.

Q. I show you a photograph that has been marked Plaintiff's Exhibit 13-B and ask you to look at that and tell me whether that shows a Pinkerton construction as

(Testimony of Stanley L. Correze)

you knew it, using any magnifying glass or anything you wish to.

A. This is partially a Pinkerton construction, but I don't recognize the connection of the whistle and fuel valve.

Q. You would say that it looks like a Pinkerton construction in general, though? A. Yes.

Q. Now, I show you another photograph that is marked Plaintiff's Exhibit 13, and ask you if you can identify that a Pinkerton construction.

A. Yes, it is.

Q. What is it? A. It is a fuel cutoff valve.

Q. Do you know when Pinkerton started making that construction? A. Yes.

Q. When? [259]

A. Approximately the first part of 19— that is, the last part of 1938. That is as close as I can recollect.

Q. Does that look like the first job that he put out?

A. I couldn't say whether that was the first one, or not. They all looked alike.

Q. You don't remember seeing any of them before the latter part of 1938, is that it? A. No.

Q. Do you know where that installation was made? Can you recognize it from the photographs?

A. No.

Q. Do you know about an installation that was made in the Athens field in 1939, about August? A. No.

(Testimony of Stanley L. Correze)

Q. If I told you that that is a picture of the installation that was made in the Athens field in 1939, would it help you refresh your memory of that and identify it better?

A. No. This shows the front end of a boiler and there are thousands of boilers all over the State.

Q. I am referring to the fuel shutoff valve.

A. That doesn't mean anything to me.

Q. Well, then, I will show you these other pictures that are marked 13 and 13-A; does that mean anything to you with regard to the date of 1939 and the Athens field?

A. No. [260]

Q. Do you remember when Pinkerton made the first installation of the structure shown in those drawings? I mean not made in the shop, but sold it and delivered it.

A. I definitely don't remember, no.

Q. Did it make any impression on you when he made his first delivery, to whom he made it?

A. No.

Q. You don't know to whom he made it?

A. No.

Q. You didn't know what the internal construction of these devices was, did you?

A. Of these?

Q. Yes.

A. I did, yes.

Q. Did you know how the whole assembly worked?

A. I made all the drawings.

Q. Did they have one or two or three or four valves in them for operating the mechanism?

A. Two valves.

(Testimony of Stanley L. Correze)

Q. And that was the first device that had two valves, wasn't it, that Pinkerton made? Prior to that they had only one valve, didn't they?

A. Of this type of construction? The old type of construction had one valve.

Q. And in 1938 was the first time they made the two [261] valves, is that right?

A. As far as I can remember.

Q. After they made the two-valve construction in 1938 did they ever return to the old one-valve construction, as far as you know?

A. That is, after making—Repeat that again, please.

Mr. Jamieson: Repeat the question, please.

(The question was read by the reporter.)

The Witness: Yes.

Q. By Mr. Jamieson: When?

A. Several times during the period of the time I worked for him a customer would order a low water alarm and not include a fuel valve cutoff. In that case there was no need of having a two-valve assembly.

Q. But the first time they made a two-valve assembly that had a fuel cutoff was in 1938, as far as you know, is that right?

A. The old type there—

Q. Answer the question, then make any explanation you want.

Mr. Jamieson: Read the question again, please.

(The following question was read by the reporter: "But the first time they made a two-valve assembly that had a fuel cutoff was in 1938, as far as you know, is that right?") [262]

The Witness. Yes.

(Testimony of Stanley L. Correze)

Q. By Mr. Jamieson: And you started working for them in 1936? A. Yes.

Q. Did you have access to the whole plant? You had the run of their entire shop? A. Yes.

Q. All the time you were there? A. Yes.

Q. You knew everything they were making?

A. Well, yes.

Q. Did you have any conversation with Mr. Pinkerton at the time that they first started making this two-valve fuel shutoff construction when you first made the drawings for it?

A. Did I have any conversation with him?

Q. Did you make the first drawings? A. Yes.

Q. When did you make them?

A. I can't give you any definite date.

Q. Some time in 1938?

A. Yes, or prior to that time.

Q. Early or late? A. I would say early.

Q. Do you remember where you made those drawings? [263] A. Yes.

Q. Where? A. 109 East Wardlow.

Q. Who else was there besides yourself at the time that you made them?

A. I believe I was the only employee.

Q. You didn't make them without any instructions from Mr. Pinkerton, did you? A. No.

Q. Do you remember the occasion of his giving you the instructions to make them? A. No.

Q. Do you remember that he gave them to you?

A. Yes.

Q. What did he say when he gave them to you?

A. I don't remember.

(Testimony of Stanley L. Correze)

Q. How did you make it, then?

A. How did I make the drawing?

Q. Yes, how did you make the drawing?

A. Pencil and paper and rule and T-square.

Q. You had to make them work; where did you get the idea?

A. The idea was originated from Mr. Pinkerton and myself.

Q. And you? Did you help originate it? [264]

A. All I did was coordinate his ideas—

Q. You misunderstand me. Did he give you a sketch or did he just explain orally to you how to make it, or did he show you another device?

A. He explained it orally to me how to make it.

Q. Did you ever see any Blanchard fuel shutoff valves? A. Yes, I have.

Q. When did you first see one?

A. I didn't know it as Blanchard. I believe it was the Inferno.

Q. When did you first see an Inferno job?

A. Approximately?

Q. Yes, just approximately.

A. In approximately 1940.

Q. Where did you see that?

A. It was on an installation I believe in the Rio Bravo oil fields.

Q. These devices that you made for the first time in 1938 were made from drawings which were drawn by you, is that right? A. Yes.

Q. And nobody else made any drawings of those for Mr. Pinkerton before that, as far as you know?

A. For this type? [265]

(Testimony of Stanley L. Correze)

Q. Yes. A. No.

Q. The two-valve type?

A. Well, not to my knowledge.

Q. How long did it take after you finished the drawings before a complete assembly was completed, if you remember, or approximately? A. Two months.

Q. So that you remember that the first device was completed some time in 1938, is that right.

A. Yes.

Q. Did that 1938 device resemble the structures shown in the photographs, Exhibits 13, 13-A, and 13-B, in any particular?

A. Exhibit 13 appears to be one of those constructions; 13-A appears to be, with the exception of the modification; and 13-B appears to be, with the exception of the modification.

Q. All right. Now, I show you a catalogue that has been marked Plaintiff's Exhibit 11, and ask you if that shows the Pinkerton structure as you knew it at the time you were employed by Mr. Pinkerton. A. Yes.

Q. And is the structure shown in Exhibit 11 exactly like that that you made the first drawings for in 1938? [266] A. 11?

Q. Yes, Exhibit 11. A. Yes.

Mr. Jamieson: That is all.

The Court: Any further questions?

Mr. Fulwider: I don't think we have any further questions, no.

The Court: All right. Step down. Call your next witness.

(Witness excused.)

Mr. Fulwider: Call Mr. Pinkerton.

The Clerk: You have not been sworn before, have you?

The Court: No, Mr. Pinkerton has not testified.

JACK LESTER PINKERTON,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jack Lester Pinkerton.

Direct Examination

By Mr. Fulwider:

Q. Mr. Pinkerton, will you tell us about when you first became connected with the oil industry?

A. About 1915.

Q. Where was that and in what capacity? [267]

A. In Ventura with the old State Consolidated Oil Company, which was later taken over by the Associated Oil Company in Ventura.

Q. Did you subsequently work for anyone else in Ventura? A. Yes; the Shell Oil Company.

Q. Approximately how long?

A. About seven years.

Q. What were your duties with the Shell Oil Company?

A. In them days it was a little bit of everything. I pumped, run the hydrating plants, worked cable tools, rotaries. That pretty well covers it.

Q. In those capacities did you have occasion to become familiar with and work with boilers?

A. Yes.

(Testimony of Jack Lester Pinkerton)

Q. When did you go to Long Beach?

A. 1924.

Q. For whom did you work then?

A. I worked three years for the Standard Oil at Santa Fe Springs.

Q. When did you start your own business?

A. Some time in 1927, the latter part.

Q. What were your first products?

A. What we called a thermostat control water regulator to control the level of water in boilers [268] thermostatically.

Q. Do you still manufacture those products?

A. Yes.

Q. When did you decide to add a line of boiler safety equipment to your business?

A. Along some time in the latter part of '31 or early '32.

Q. What types of boilers were being used generally in the oil business for drilling rigs and pumping leases at that time?

A. Pumping leases was usually, most of them, the water tube type. Drilling boilers was the locomotive or fire boiler type, as we called them in the oil fields.

Q. Were those high or what would be termed high, or low pressure? A. Low pressure.

Q. When you decided to build boiler safety equipment, what did you do?

A. Will you repeat the question, please?

Mr. Fulwider: Will you read the question, please?

(The question was read by the reporter.)

The Witness: Well, I fixed up some sketches. I had a neighbor by the name of Mr. Good, and between the

(Testimony of Jack Lester Pinkerton)

two of us—he was a carpenter and done some of his own drawing, and I used to get him over to my place at nights and I knew what I [269] wanted, and with his help we was able to sketch out what we wanted and had patterns made.

Q. By Mr. Fulwider: Did you have any castings made from those patterns? A. We did.

Q. Where did you take them, if anywhere, for machining?

A. We took them to the old Master Equipment Company.

Q. Where were they located?

A. I believe at that time on Firestone Boulevard.

Q. In Los Angeles? A. Yes.

Q. Who was the superintendent of Master Equipment at that time?

A. Do you mean of the shop, or general superintendent?

Q. Shop.

A. Mr. Harvill. We called him in them days Red Harvill.

Q. Is that the Mr. Harvill who has the Harvill Die Casting Corporation, the man who testified here the other day? A. Yes.

Q. What is his reputation, if you know it, in the industry? A. Tops.

Q. In what respects? [270]

A. An outstanding engineer in die casting, in particular aluminum. He is recognized in the United States in aluminum die casting.

(Testimony of Jack Lester Pinkerton)

Q. I call your attention to Exhibit E, and ask you if you will tell me what this is.

A. That is a low water fuel valve.

Q. Is that one of your products? A. It is.

Q. Can you tell me approximately when this particular individual valve was made, roughly?

A. I would say the latter part of '31 or early '32.

Q. I don't mean, necessarily, the valves of this type, but I mean this individual valve right here; do you know when this particular valve was made?

A. Not when that particular one was made, no.

Q. Can you tell me where it was made?

A. In was made in our shop in Long Beach.

Q. Is this one of what you called your low pressure system fuel shutoff valves? A. It is.

Q. How does this valve, Exhibit E, compare with those first valves that were made for you or machined for you, rather, at Master Equipment Company in '32?

A. The fuel valves, you mean?

Q. Yes. [271]

A. They were identically the same.

Q. Have you ever had any other than the one set of original patterns for the castings included within this Exhibit E?

A. Yes, later on we made different sizes.

Q. Were there any changes in design made?

A. No.

Mr. Fulwider: I will offer this in evidence, then. I think it was only marked for identification. It is E in evidence.

(Testimony of Jack Lester Pinkerton)

The Court: All right. E in evidence.

(The object referred to, heretofore marked Defendants' Exhibit E, for identification, was received in evidence.)

Q. By Mr. Fulwider: Why don't you come down here and save me carrying these up to you—

Mr. Jamieson: I understand that is offered to illustrate his testimony and not as having been produced at any particular time, is that right, Mr. Fulwider?

Mr. Fulwider: That is correct. This Exhibit E is identical—

Mr. Jamieson: Illustrative?

Mr. Fulwider: Identical and illustrative.

Mr. Jamieson: I mean for comparison. You fix no date as to when this particular one was made? [272]

Mr. Fulwider: That is right. It is offered as being identical with the ones that he has testified were made in early 1932.

The Court: All right.

Q. By Mr. Fulwider: Now, will you examine Exhibit F and tell me what that is, where it was made, and who made it?

A. Does this letter "F" cover all three of these parts?

Q. Yes, letter "F" covers both halves of the casting, plus the front and the valve mechanism inside.

A. Now, will you repeat the question?

(The question was read by the reporter as follows:

"Now, will you examine Exhibit F and tell me what that is where it was made, and who made it?")

The Witness: That is a low water alarm body. It was made in our shop. I would like to change that.

(Testimony of Jack Lester Pinkerton)

That was made at the Master Equipment Company. We had no shop at that time.

Q. By Mr. Fulwider: Can you tell whether or not this particular one sitting in front of us is one of the ones made at Master, or machined at Master, or machined in your shop subsequently?

A. It could be either.

Q. Will you examine that and tell me what differences, if any, there are between this Exhibit F in front of you, and [273] the alarm bodies which were machined for you by Master in early 1932?

A. There would be no difference.

Mr. Fulwider: I will offer Exhibit F in evidence, if your Honor please, for the same purpose as Exhibit E.

The Court: All right.

The Clerk: F in evidence.

(The object referred to, heretofore marked Defendants' Exhibit F, for identification, was received in evidence.)

Q. By Mr. Fulwider: Do you remember the name of any mechanic who worked on these items of yours at the Master Equipment Company?

A. Yes, one in particular, Mr. Robison.

Mr. Fulwider: I think it is just R-o-b-s-o-n.

Q. By Mr. Fulwider: After Mr. Harvell left Master, did you have any work subsequently done by him in his own shop?

A. Yes.

Q. To the best of your recollection when were the first alarm bodies, Exhibit F, and fuel valves, Exhibit

(Testimony of Jack Lester Pinkerton)

E, manufactured or completed for you by Master and assembled by you?

A. Will you read that question again, please?

(The question was read by the reporter.) [274]

A. I would say it was the latter part of '31 or early '32.

Q. Did you during the year 1932 ever call on a man by the name of Frank Van Slyke? A. Yes.

Q. Superintendent of Continental Oil Company at Seal Beach? A. Yes.

Q. What was the purpose of your visit?

A. It was to interest him in some of our low water alarms and fuel valves.

Q. What success did you have at first?

A. He wasn't much interested.

Q. Was there anything that subsequently happened that changed his interest? A. Yes.

Q. What? A. He had a boiler blow up.

Q. Approximately when was that?

A. I believe that was around the middle of 1932.

Q. During the latter part of '32 were you successful in selling some units to the Continental Oil Company?

A. We was.

Q. What did you sell to the Continental?

A. Low water alarm, fuel valve, and a steam whistle— [275] correction, steam whistle valve and steam whistle.

Mr. Jamieson: Pardon me. Will you read that?

(The answer was read by the reporter.)

Q. By Mr. Fulwider: Were the low water alarm and fuel valve being sold to Continental identical with Exhibits F and E, respectively, here? A. Yes.

(Testimony of Jack Lester Pinkerton)

Q. Calling your attention to drawing Exhibit F-3, can you tell me whether or not that is a reasonably fair representation of the type of installation that you made at Continental in—when was it, 1932?

A. The only difference would be is where the relief or bleed valve is located.

Q. Where is the relief valve in that drawing there?

A. Direct out from the alarm body.

Q. And that relief is connected to the steam line that goes down to the fuel valve, is it? A. Yes.

Q. What happened when the boiler water went down in a boiler, such as the one illustrated here, on which your equipment was installed?

A. As the water went down to a dangerous level in the boiler, what we would call the lower part of the glass, your float would drop and your needle valve and arm hook to the float, it would allow the needle valve to open, allowing [276] boiler pressure to escape through the needle valve into the copper lines, one runs down to the low water fuel valve, the other runs to the top of the boiler to a steam manifold, and from the steam manifold a copper line runs to the steam whistle valve, which is installed on the main steam header of the boiler plant.

Q. When the steam passes through the needle valve to the fuel cutoff valve what happens?

A. Your steam pressure in your boiler is greater than in your cylinder of your fuel valve, so when you build up your boiler pressure it collapses your cylinder and closes your valve.

Q. Closes the fuel valve? A. That is right.

Q. Cuts off the fuel to the boiler?

A. To the boiler.

(Testimony of Jack Lester Pinkerton)

Q. And does it also blow the whistle?

A. At the same time.

Q. How did the whistle valve used in the early installation compare with the fuel valve in construction?

A. The same principle, cylinder type.

Q. Did it have a piston in it? A. Yes.

Q. And the operation of that piston operated a valve in the steam line? [277] A. Yes.

Q. And that permitted steam to flow to the whistle?

A. That's right.

Mr. Fulwider: I might say here, your Honor, I don't want to burden the record, but if there is any question about when that boiler blew up in Seal Beach in 1932, I have the records here somewhere of the shop who repaired it.

The Court: The year is all-important.

Mr. Fulwider: I think I might as well offer it. I didn't ask him to come up and identify his book. We have the book which he very kindly loaned to us, and the photostats of pages. I wonder if Mr. Jamieson would like to look this over, and if it looks sufficiently legitimate to you, maybe you will stipulate what it seems to be without bothering this old gentleman. He has been in business a long time.

Q. By Mr. Fulwider: Do you know whether that Continental job was prior to or subsequent to the earthquake of March, 1933? A. It was prior to.

Q. I will ask you this question. When you finally made your sale to the Continental was it to Mr. Van Slyke?

A. Yes, he was the superintendent. You had to have his O. K. on any sales.

(Testimony of Jack Lester Pinkerton)

Q. When you made up the first castings and took those in to Master Equipment for machining, when Mr. Harvell was [278] there, at that time did you have any shop drawings?

A. We just had penciled sketches.

Q. Did you subsequently have shop drawings made?

A. I don't quite understand what you mean by having drawings. Do you mean before I went to the Master Equipment?

Q. No. After you had that first work done at Master did you have anybody make up any drawings?

A. They would have had to make up shop drawings for their own use.

Q. Do you know Mr. Beck? A. Yes.

Q. Did you have him make any drawings for you?

A. Later on.

Q. Will you examine these drawings here, Exhibit E-2, on top here, and tell me what that is and where you got it?

A. That is a low water level fuel valve. Mr. Beck made them drawings.

Q. Were they delivered to you on or about the date that they bear here, April 19, 1935?

A. I would say yes.

Q. Have they been in your possession ever since, until you gave them to me the other day?

A. They have.

Q. Will you look at this other drawing here, F-3, and tell me what that shows and approximately when it was made [279] or delivered to you, having reference to the date in the corner?

A. It is a low alarm body assembly.

(Testimony of Jack Lester Pinkerton)

Q. Is that a drawing of the model Exhibit F on the floor, alarm body? A. Yes.

Q. I believe I forgot to ask you whether or not this drawing over here fairly represents or is the shop drawing for the fuel valve Exhibit E.

A. It is the same.

Q. Was this delivered to you by Mr. Beck?

A. I don't remember if it was delivered or I picked it up.

Q. Do you remember having it made about this time?

A. That's right.

Mr. Fulwider: I believe we stipulated that this is typical of Reliance valves manufactured prior to 1930, low water alarm.

Mr. Jamieson: You have got it in evidence, haven't you?

Mr. Fulwider: No. I would like to offer this in evidence as Exhibit A, as being typical of a Reliance high and low water alarm manufactured prior to 1930.

The Court: All right.

The Clerk: Defendants' A in evidence. [280]

(The exhibit referred to, heretofore marked Defendants' Exhibit A, for identification, was received in evidence.)

Q. By Mr. Fulwider: Mr. Pinkerton, how long—I am going to ask it to you this way: Did you make any sales of the low pressure alarm and fuel valve equipment after that first Continental job? A. Yes.

Q. Have you been able to find any records or papers indicating any subsequent sales made in that period?

A. A few.

(Testimony of Jack Lester Pinkerton)

Q. I have a group here—

A. Most of them we were not able to get any records that far back.

Mr. Fulwider: I think we might as well clip all these and it will be one exhibit.

The Clerk: This will be Defendants' Exhibit N, for identification.

(The group of papers referred to was marked Defendants' Exhibit N, for identification.)

Q. By Mr. Fulwider: I have here some delivery receipts, purchase orders; will you identify those for me? Let me ask you this: are those the records you have been able to find?

A. I will say they are the records. [281]

Q. While Mr. Jamieson is examining those, let me ask you this question: Did you continue to sell your low pressure alarms and fuel valves as illustrated in Exhibits E and F after you had started manufacturing and selling your high pressure type alarm system? A. Yes.

Q. Calling your attention to these various exhibits here, which are part of N, the first one is a delivery receipt indicating delivery to St. Helens Petroleum Company January 22, 1938. It says here "4-1 inch 150 lb. W. P. Pinkerton low water alarms; 1-1½ inch whistle control valve; 1-2 inch whistle; 1-1½ inch Pinkerton boiler feed water regulator." Will you tell me what those items are from the sizes? Would those be your low pressure or high pressure systems?

A. Those would be the low pressure.

(Testimony of Jack Lester Pinkerton)

Q. By reference to this delivery receipt would you say that you had or had not delivered that material to the St. Helens Petroleum Company? A. We had.

Q. Here is a P. O. That refers to that receipt, doesn't it? A. Yes.

Q. Here is another delivery receipt of J. L. Pinkerton, Inc., 4-3-40, Lloyd Corporation. Reading the items on there, [282] can you tell me—this one says "2 low pressure low water alarms," are those the alarms, your old low pressure alarms? A. They are.

Q. Were they delivered about the date of this delivery receipt? A. They were.

Q. To the Lloyd Corporation?

A. That is right.

Q. Here is the P. O. for that. Here we come up to '44, July, some items to the Oil Steel Construction, a similar receipt, Pinkerton feed water regulator—no, Pinkerton low water alarm 50 lb. pressure. Would that be your low or your high pressure type?

A. That was the low.

Q. Finally a sale—purchase order here and delivery receipt from the Continental Oil Company, 2 Pinkerton low pressure alarms. Were those low pressure alarms ordered and delivered? A. They were.

Q. On or about the date of October, 1946?

A. Yes.

Q. To Continental Oil Company? A. Yes.

Q. And those were all of the type illustrated by Exhibit E and F, the models here in court? [283]

A. Yes.

(Testimony of Jack Lester Pinkerton)

Mr. Fulwider: I offer those in evidence, your Honor, as tending to prove continuous sale to some extent, at least, of the low pressure.

Mr. Jamieson: I object to that as incompetent, irrelevant, and immaterial to any issue in this case.

Mr. Fulwider: It is competent to this, your Honor: I gathered from Mr. Jamieson's remarks the other day that he is going to urge this sale to Continental Oil Company in '32 was an isolated sale of some equipment that had no merit. And in view of those remarks he made, I thought we had better get together what records we could and submit them.

The Court: All right. Overruled.

The Clerk: Defendants' N in evidence.

(The group of papers referred to, heretofore marked Defendants' Exhibit N, for identification, was received in evidence.)

Q. By Mr. Fulwider: Before we leave the low pressure apparatus, you discussed the construction; I would like to have you, however, point out to his Honor how this needle valve works.

A. Do you want me to come down?

Q. No, I will bring this up to you there. Tell us just what happens when this float goes down in the cylinder [284] there so we will have it clearly.

A. The float was attached to the needle valve lever, and as your water level drops in your low water alarm body your float drops down and pulls this needle valve down, which opens the needle valve and lets your steam pressure come through your ports.

(Testimony of Jack Lester Pinkerton)

Q. There are two ports, I believe, one on the side here, and one on the top? A. There is.

Q. Which goes to where?

A. Usually the one coming out of the top will go to a steam whistle which is up in the steam header of the boiler plant.

Q. And the one on the side?

A. Usually goes to the low water fuel valve.

Q. Referring to this fuel control valve, Exhibit E, I call your attention to the fact that it has a little cock in a "T" fitting here and another little fitting with a bleed opening in it. Will you tell me whether or not the unit delivered to Continental in 1932 had a bleed similar to that little fitting there? A. Yes, they all did.

Q. I was just going to ask you if you ever made one that didn't have a bleed.

A. No. If we made one—of course, understand, [285] these are just standard fittings that we buy, that is no part of the construction of the water fuel valve itself.

Q. You made the fuel valve and then bought the appropriate fittings to go with it? A. That is right.

Q. What is the purpose of that little bleed on there?

A. That is for releasing the pressure on the cylinder.

Q. I mean these little tiny pinhole bleeds.

A. That is for a constant bleed in case your needle valve in the alarm happens to get any scale underneath it, or it would be worn and have a slow leak, the constant bleed which shows here in this little pinhole is to keep the pressure relieved out of the line, keep it from closing this. In other words, it is liable to close at any time with the constant pressure dripping through that line if you didn't have a release for it.

(Testimony of Jack Lester Pinkerton)

Q. Is that bleed large enough to interfere with the operation of the valve when steam under full pressure from the boiler comes through the line?

A. No, it is not. It is a smaller hole than our needle valves, consequently it will build up a pressure, your steam pressure in the line which will operate your cylinder and close your valve.

Q. With respect to this little relief cock on the fitting there, what is the purpose of that? [286]

A. To release the pressure from your cylinder and allow the valve to open.

Q. Can you say whether or not there was always one of those furnished with one of your systems?

A. Yes.

Q. There was or was not? A. There was.

Q. For installations using low pressure boilers of the type you mentioned as being used on pumping leases and drilling rigs in 1932, was this low pressure system of yours satisfactory?

A. Well, at that time that was about the only system that was tried to be used on a fire type boiler or low pressure being used in the oil industry itself. The old Reliance was the old standard high and low alarm system in columns which was used in most all major plants and refineries. We designed that primarily for it to be used out on remote boilers in the oil fields.

The Court: That couldn't be watched?

The Witness: That's right.

Q. By Mr. Fulwider: That is where the operator had to be quite a ways distant from the boiler, perhaps?

A. Along in '32 that quite often happened. In them days they wasn't getting much for their oil, and they

(Testimony of Jack Lester Pinkerton)

wasn't spending any more money than they had to. For that reason [287] they was quite often laying off men and doubling up men that was looking after production and also taking care of plants.

Q. Did anything serious happen to the lease or the equipment on the lease if the fire was shut off before the operator got back, if he was a mile or two away, say?

A. Not them days on pumping rigs. A well could stop on a pumping rig and it didn't make much difference.

Q. How about drilling rigs in 1932 and '33?

A. At that time there was no demand, in fact, if you would go out and try to talk alarms to people on a drilling rig under low pressure with the man on the job, he thought you was crazy.

Q. If your fuel did shut off so the boiler was shut down in operations, which they were conducting at that time, was there any critical danger in a drilling rig?

A. Will you repeat that?

(The question was read by the reporter.)

A. In—

Q. By Mr. Fulwider: In 1932 and thereabouts.

A. Well, a boiler could have still blowed up in 1932, yes.

Q. What I am getting at is can you shut off, or could you at that time shut off a fuel on your boilers in your drilling rig without great expense or anything bad happening to you in the low pressure boilers that they were using [288] then?

A. You will have to repeat it, because I haven't quite got it clear in my mind.

(The question was read by the reporter.)

(Testimony of Jack Lester Pinkerton)

The Witness: Yes.

Q. By Mr. Fulwider: During the time that you were selling low pressure safety systems in the early '30's, we will say, '32, '33, '34, and '35, did you have any serious complaints or objections from your customers or your potential customers to the fuel being shut off at the same time the whistle was blown?

Mr. Jamieson: That is objected to as hearsay and calling for a conclusion.

The Court: He may testify as to the design, and that he proceeded to improve it, or something like that.

Mr. Fulwider: What I was getting at was that for that purpose that equipment was satisfactory and he did not have any complaints.

The Court: That is a negative. I will sustain the objection.

Mr. Fulwider: Your Honor, could we take a breather for a little while?

The Court: I thought you were through with the witness.

Mr. Fulwider: I am about two-thirds through. I wanted to discuss high pressure, and then I had a few more exhibits. [289]

The Court: All right.

(A recess was taken.)

Q. By Mr. Fulwider: I believe we just completed a discussion of the low pressure types. How did you happen to add to your line of low pressure equipment what you call your high pressure alarms and fuel shutoffs?

A. Well, in the last few years in the oil industry as they were going into big rigs, they kept getting higher pressures on boilers; as the pressures went up on boilers,

(Testimony of Jack Lester Pinkerton)

then we had to go into a higher pressure to meet the codes, the correct pressure that would fit on these boilers, particularly when they got into the 350-pound pressure. Back in the low pressure it was from 100 to 125-pound pressures.

Q. When they were using—I imagine those high pressure boilers were mostly on drilling rigs, weren't they?

A. That is right.

Q. Was there much change in pumping leases?

A. No.

Q. But in drilling rigs they went to the high pressures?

A. Yes.

Q. With the high pressure boiler and a hole that is going down to the depths to which they have been sinking them in the last eight, ten years, are there any bad [290] effects from having the boilers shut down?

A. Yes.

Q. Will you explain that just briefly to us?

A. A boiler shutdown on a drilling rig a matter of a few minutes, we will say in case the fire went out, a matter of five, ten minutes, the driller operating the drilling equipment in the rig wouldn't be able to pick the drill pipe up off the bottom if his steam pressure dropped very much.

Q. That being the case what did you decide to do with respect to this new high pressure equipment which you were going to put out? When was it, in about '38?

A. It was in the latter part of '37 or the first of '38 when we started to make our changes over to high pressure, that is, high pressure body. We still continued with the same system, alarm system.

(Testimony of Jack Lester Pinkerton)

Q. You added another valve alongside—

Mr. Jamieson: We object to leading and suggestive questions. Can't you ask him what he did?

The Court: What did you say?

Mr. Jamieson: I object to counsel leading the witness. I think the witness can tell what he did without being led.

The Court: Yes. All right.

Mr. Fulwider: I don't want to lead him where it is important, but I look at this as strictly a basic question.

Mr. Jamieson: I don't know what is important and what [291] isn't. I would rather he wouldn't be led.

Q. By Mr. Fulwider: Your high pressure equipment, that is, the alarm body and valve mechanism, had two valves side by side; your old equipment had one valve—

Mr. Jamieson: We object to counsel testifying.

Mr. Fulwider: My God, it is in the record; you have got drawings.

Mr. Jamieson: Can't you ask him without leading him?

Q. By Mr. Fulwider: Will you please tell us how the valve mechanism in your high pressure alarm body is constructed?

A. We have one float, two arms, two needle valves; your arms are constructed side by side with a pin from the float arm extending over to a bracket or hole in our fuel valve or short lever, so when your float drops down so far it opens the whistle, and if your water level in your boiler continues to go on down it drops down lower, and then it catches the side of that hole or bracket—

Q. Pardon me. I didn't mean to interrupt you. I was getting ready for the next question.

(Testimony of Jack Lester Pinkerton)

(The answer thus far was read by the reporter.)

A. (Continued) Bracket is not correct.

Q. Let me show you Exhibit C. Using this to explain, will you tell us how that operates?

A. Yes. There is a float that is hooked onto this [292] arm lever, and as your water level in your boiler starts dropping down to a dangerous low level your float continues to follow down, because your alarm body is hooked onto your boiler. As it starts down it first opens a whistle, as this valve starts to open, then as it drops down it catches this second lever, this boss with the hole in it. It can drop about five-eighths to three-quarters of an inch. It catches and opens that one, lets steam pressure go down through to the copper line leading to our fuel valve, and allows it to build up a pressure and close the fuel valve.

Q. So that in that system you first blow the whistle—

A. That's right.

Q. And then you shut the fuel valve off later?

A. Yes.

Q. Is there any reason for having a time interval between the blowing of the whistle and the shutting off of the fuel valve?

A. On drilling rigs, yes, because they have a constant attendant at the boilers. I mentioned a few moments ago if steam pressure drops down very much it is very important on the drilling rig, as the water drops down a little bit, sounding an alarm as a warning signal to the fireman or engineer, it gives him time to correct his water level in the boiler before the water drops low enough to shut out his [293] fires, which is very dangerous on a drilling rig.

(Testimony of Jack Lester Pinkerton)

Q. At the time you entered the business of making boiler safety equipment were you familiar with the Reliance valve, Exhibit A? A. Yes.

Q. This high and low water alarm? A. Yes.

Q. Are you familiar now with the Blanchard Inferno system of boiler alarm?

A. I can't say that I am familiar with it.

Q. Well, I call your attention to this 2-valve model, Exhibit 5; can you tell me what advantages, if any, there are in your apparatus over the Blanchard Inferno apparatus, so far as the valve mechanism goes?

Mr. Jamieson: That is objected to as incompetent, irrelevant, and immaterial.

Mr. Fulwider: I think it is material, your Honor.

The Court: Read the question.

(The question was read by the reporter.)

Mr. Jamieson: It will not avoid infringement to make any additions to the infringing structure.

Mr. Fulwider: There are substantial differences between the two structures. Mr. Jamieson will argue that they are equivalents, and we have done what he did. Mr. Blanchard says it was 75 per cent as effective as his was. I would [294] like Mr. Pinkerton to show why we are better than Mr. Blanchard's.

Mr. Jamieson: That is not in issue.

The Court: The objection is overruled.

The Witness: Will you repeat the question, please?

The Court: Mr. Blanchard was allowed to testify very fully as to why in his opinion the accused device achieved the same results in substantially the same manner, under the doctrine of equivalents. I did not allow him to use the word "equivalent." Certainly this man can, as a part

(Testimony of Jack Lester Pinkerton)

of his case, and especially because he has a counterclaim, testify that his device achieves things that are not possible to be achieved by the other; that it has advantages over the other. And if it does, then it is not the equivalent any more.

Mr. Jamieson: If he does something in addition to the infringement, it is a mere addition and doesn't avoid infringement.

The Court: I know, but that is not the point. We are talking about the doctrine of equivalents.

Mr. Jamieson: That was not his question.

The Court: I know. But I know what it is directed at. If this apparatus with the changes this man has made with it achieves other results which cannot be achieved by the Blanchard apparatus, then it is invention over the prior art, including Blanchard. The doctrine of equivalents calls for [295] substantially the same result by different means.

Mr. Jamieson: He is not asking him whether he achieves the result of Blanchard.

The Court: He cannot ask him that, because that would be a conclusion.

Mr. Jamieson: I would not object to that.

The Court: He is asking for facts.

Mr. Jamieson: I would not object to that at all.

The Court: The question as propounded is very simple, and it calls for results as compared with the Blanchard, and that is always permissible.

Read the question.

(Testimony of Jack Lester Pinkerton)

(The question was reread by the reporter as follows:

“Q. Well, I call your attention to this 2-valve model, Exhibit 5; can you tell me what advantages, if any, there are in your apparatus over the Blanchard Inferno apparatus, so far as the valve mechanism goes?”)

The Witness: We claim we have a much safer acting device than this, because we allow more freedom in our construction of the valves to eliminate corrosion or scale from scumming in between the vises here, which will allow them to freeze up and not operate. Ours is much freer.

Q. By Mr. Fulwider: I call your attention here to Exhibit B, maybe that will assist you in your remarks.

A. Here is an illustration right here. Taking the [296] weight of a float, which is about four inches long, and all it is—

Q. You had better speak up. I don't think the reporter can hear you.

The Court: I am just looking at the device; you do not need to talk in my ear.

The Witness: I am sorry.

Now, you can notice here you are getting a sticking action from your needle valves, and the weight of a float operating that, there isn't enough weight on that float floating in water, which you will have a float for a demonstration, it will not allow free action of them valves.

The Court: Yes?

The Witness: (Continuing) So for that reason if you will allow me to look at our valve, I will show you your freedom of actions.

(Testimony of Jack Lester Pinkerton)

Q. By Mr. Fulwider: Show this one here to his Honor, Exhibit C.

A. You will notice here we allow much more freedom in here to get away—if you take in any boiler with steam, you can't get away, regardless of your treatment of the water, from a certain scum or a fine scale or corrosion, which is getting this action right here (demonstrating). In fact, you can turn the whole valve over. I am trying to show you that a float cannot operate them valves, the [297] function of them, that is why we left a clearance of operation so there could be no sticking action in them. This is a much safer valve, construction of a valve, than these are (indicating).

The Court: What is the advantage of the greater freedom of action?

The Witness: As a safety device.

The Court: It is not as likely to get stuck?

The Witness: That's right.

The Court: And the other one might, is that it?

The Witness: It has a tendency much more so, because you will notice here your freezing action right there on your rings now.

Q. By Mr. Fulwider: Does this extra length that you have here on your fuel valve contribute to that freedom any? That is, by having this link here loose with respect to this pin, and having this link—

A. Do you mean the freedom of the complete assembly?

Q. Yes.

The Court: Yes.

A. Yes, it does.

(Testimony of Jack Lester Pinkerton)

Q. By Mr. Fulwider: By having a link here, extra link, instead of having a connection directly to the valve?

A. Yes.

Mr. Jamieson: We object to that as leading and [298] suggestive.

The Court: That is all right.

Mr. Fulwider: I am describing the apparatus and asking him about it.

The Court: You are both doing the same thing, and each objects when the other fellow does it.

A. We have two separate elements—

Mr. Jamieson: Of course I will get a chance on cross examination.

Q. By Mr. Fulwider: You might show this to his Honor too.

A. May I finish on this?

The Court: Go ahead.

A. These are two separate elements, where from one float here you are controlling all of your elements together. Here we have two separate elements and two separate valves.

Q. By Mr. Fulwider: When you said "here" the last time you were pointing to Exhibit C?

A. Yes.

Q. And the first one you were pointing to was Exhibit B? A. Yes.

Q. By the way, Mr. Pinkerton, do you know of any boilers equipped with Mr. Blanchard's control apparatus or [299] safety apparatus that have ever blown up?

A. Yes.

(Testimony of Jack Lester Pinkerton)

Q. Can you tell me approximately when and where?

A. For the Ohio Oil Company out here in Gardena, right along off the side of Western Avenue, in 1945, it blew up a boiler there.

Q. Did you see that boiler after it blew up?

A. Yes.

Q. And that was equipped with Blanchard alarms?

A. Alarms and fuel valves.

Q. When did you first start making the plug type valve assembly illustrated in Exhibit 12 here, this one here (indicating)?

A. In '44.

Q. I call your attention to this drawing in front of you, Exhibit L; can you tell me what that drawing is and where it came from?

A. Yes. There was a time that we could not get steel castings, it was not available, so at that time in order to take care of our customers, not being able to get steel castings I went up to the Crane Company to see if I would be able to have alarm bodies made up out of pipe. In talking to Mr. Fay, I believe he was the engineer at that time for the Crane Company, he made up this drawing and sketch. We took in some sketches to him, and from them he made up this [300] drawing.

Q. Did you have some alarm bodies made in accordance with this blueprint, Exhibit L?

A. Yes.

Q. And they were made by the Crane Company?

A. Yes.

Mr. Fulwider: I would like to offer that in evidence, I believe it was only marked for identification before, as illustrating the testimony of both Mr. Fay and Mr. Pinkerton.

(Testimony of Jack Lester Pinkerton)

The Clerk: Which number is that?

Mr. Fulwider: That is L.

The Court: Admitted.

The Clerk: Defendants' L in evidence

(The blueprint referred to, heretofore marked Defendants' Exhibit L, for identification, was received in evidence.)

Q. By Mr. Fulwider: Did you say when you stopped—

Mr. Jamieson: Could you talk a little louder? We can't hear you.

Q. By Mr. Fulwider: Did you say when you stopped making those plug types?

A. Some time in '46. We made the plug types approximately around a year, 15 months.

Q. I believe I showed Mr. Fay a group of sheets, receipts and P. O.'s; can you identify those as to what they [301] are and where and when you got them?

A. I got them from the Crane Company. That would be their slips.

Q. What does this first sheet indicate to you, if anything?

A. That indicates that they made up three of the alarm bodies for us.

Q. And that is dated May 12, 1944. Would you say that was the first or later orders made by them?

A. That was the first.

Mr. Fulwider: I don't think there is any point of going through those again, your Honor. I offer those in evidence. They were merely marked for identification before.

(Testimony of Jack Lester Pinkerton)

The Court: They may be received.

The Clerk: Defendants' Exhibit M in evidence.

(The group of papers referred to, heretofore marked Defendants' Exhibit M. for identification, was received in evidence.)

Q. By Mr. Fulwider: Referring to these photographs, Exhibit 13-A, have you examined this photograph? A. Yes.

Q. Will you tell me what that shows?

A. It shows our alarm body and the outside of our needle valve flange, which has been reconstructed by somebody outside of ourselves, for a reason that I can't answer. [302]

Q. Did you ever make or sell a structure such as shown in the upper portion here, that is, this extra stuff that is fastened on the flange? A. We did not.

Q. When was the defendant Pinkerton Corporation incorporated, approximately? A. '38.

Q. Are you an officer of the Pinkerton Corporation?

A. Yes.

Q. What is your office?

A. President and general manager.

Q. At the time of the incorporation of the defendant Pinkerton Corporation, did you sell or did you not sell your business to the corporation?

A. We sold the business to the corporation.

Q. Since the date of incorporation have you conducted any business of manufacturing or selling alarm or safety systems as an individual? A. No.

(Testimony of Jack Lester Pinkerton)

Q. You have, however, acted in manufacturing and selling those systems as the president of the Pinkerton Corporation? A. Yes.

Mr. Fulwider: That is about all, except if I may have a couple of exhibits to introduce by this witness. [303]

The Court: All right.

Mr. Fulwider: These photographs of exhibits, E and F.

Q. By Mr. Fulwider: I show you here three photographs marked E-1, F-1, and F-2; can you tell me who made those and under whose direction they were made, and what they show?

A. I am not sure I understand the question correctly.

Q. What do those photographs show? I mean what was photographed?

A. This shows a complete assembly of the low water alarm body.

Q. Did you have that photograph made?

A. Yes.

Q. From what was it made?

A. From the body, the same as it is down there.

Q. Exhibit F? A. Exhibit F.

Q. When was it made? A. This picture?

Q. Yes. A. About three or four days ago.

Q. By whom?

A. The Inman Company at Long Beach.

Q. Is the same true of these other two photographs here? A. Yes. [304]

Q. Exhibits E-1 and F-2? A. Yes.

Mr. Fulwider: I offer those in evidence, your Honor, as being photographs of the models.

(Testimony of Jack Lester Pinkerton)

The Court: They may be received.

The Clerk: E-1, F-1, and F-2, in evidence.

(The photographs referred to, heretofore marked Defendants' Exhibits E-1, F-1, and F-2, respectively, for identification, were received in evidence.)

Mr. Fulwider: Our Exhibit D, I believe, is not in evidence yet?

The Court: What is D?

Mr. Fulwider: It is just a drawing that I had my draftsman make up of the apparatus, Exhibit C. I would like to offer that.

The Court: All right.

The Clerk: D is in evidence. This tab on it is ambiguous, it shows it for identification only.

The Court: Let's put it in.

The Clerk: D in evidence.

(The drawing referred to, heretofore marked Defendants' Exhibit D, for identification, was received in evidence.)

Mr. Fulwider: These drawings that were E-2, F-3, and F-4, those are the old drawings. I believe the witness [305] identified these and they have been identified by the draftsman. I would like to offer these in evidence. That is, E-2, and F-3.

The Court: All right.

Mr. Fulwider: I offer F-4.

The Court: All right.

(Testimony of Jack Lester Pinkerton)

Mr. Fulwider: And H, also.

The Court: All right.

(The drawings referred to, heretofore marked Defendants' Exhibits E-2, F-3, F-4, and H, respectively, for identification, were received in evidence.)

Mr. Fulwider: That is all.

The Court: Cross examine.

Cross-Examination

By Mr. Jamieson:

Q. Mr. Pinkerton, I understand from your testimony that you were personally present when the installation was made at the Continental Company in Seal Beach in 1932 or '33, whenever that was; is that right?

A. I was usually present at most of the installations, but I can't pick out any particular one.

Q. Then you wouldn't say that you were present at that installation?

A. I say I couldn't pick out any single one. I wouldn't say I wasn't. [306]

Q. Did you install more than one device for the Continental Company at Seal Beach? A. No.

Q. You only made one installation in your entire life down there, is that right?

A. Are you speaking of me myself personally?

Q. You yourself personally.

A. Myself personally I didn't install any. They had men do it.

Q. Then you supervised the installation of only one, is that right? A. Yes.

(Testimony of Jack Lester Pinkerton)

Q. And what do you now remember of that installation, if anything?

A. I don't understand the question.

Mr. Jamieson: Read the question.

(The question was read by the reporter.)

The Witness: It was put on or installed.

Q. By Mr. Jamieson: Do you remember the parts that went into that installation?

A. Are you speaking of parts of my device?

Q. The mechanism that went into the installation.

A. Yes.

Q. Tell us in your own words what went into that installation. [307]

A. What part of the installation?

Q. The entire thing that you put in.

A. Of our elements?

Q. Yes.

A. There was an alarm, a fuel valve, a steam whistle valve, of our elements. Then standard pipes and fittings and connections.

Q. Have you made any effort to locate that particular mechanism?

A. I don't just understand what you mean.

Q. Have you made any effort to locate the structure that went into that Continental job in 1931 or '32, or whenever you put it in there?

A. You mean have I went out to try to find out where it is?

Q. That is what I want to know. A. No.

Q. You have made no effort to locate the exact parts that were in there? A. No.

(Testimony of Jack Lester Pinkerton)

Q. Did you see the parts again after they were installed?

A. That I couldn't be positive. I serviced them, possibly, yes, some of them.

Q. Do you remember of your own independent knowledge [308] that you serviced them?

A. Yes.

Q. When? A. I don't remember.

Q. What year did you service them?

A. I don't remember what year.

Q. What did you do when you serviced them?

A. I went out there and examined them, whatever they needed I fixed.

Q. How often do you have to service parts?

A. That depends.

Q. How often should these valves be serviced?

A. That depends.

Q. Depends on what?

A. They can get scale underneath them, depending a lot on the experience of the operator, your pressures.

Q. Can you tell whether there is scale under them without taking them apart? A. No.

Q. Then you have to have some kind of policy about inspecting, don't you? A. That is right.

Q. What is the policy of your company?

A. If we have a needle valve leaking our policy is to look at the needle valve, test it and find out what is wrong [309] with it.

(Testimony of Jack Lester Pinkerton)

Q. After you make an installation do you go out and inspect them regularly, or do you wait until the company calls you and tells you there is some trouble?

A. Both. If I am passing by I possibly stop and inspect them. If not, I wait until they call.

Q. How often do you make those inspections?

A. No specific time.

Q. What kind of needle valve was there in that job at Seal Beach?

A. The same as in that one down there (indicating).

Q. Will you describe it? Not this one, but the one that you put in down there.

A. It was a needle valve approximately a quarter of an inch round, and the same length as the ones down there, approximately (indicating).

Q. Is that this one that you are referring to?

A. Yes.

Q. You mentioned that single valve has two openings, is that right, one for—

A. Not a single valve couldn't have two openings.

Q. What were the two openings that you referred to in your direct examination?

A. This top flange or plate, one out of the top and one out of the side. [310]

Q. Isn't that a single valve? A. Yes.

Q. Doesn't it have two openings?

A. The valve itself?

Q. No. The device.

A. Let me see if I understand correctly. May I separate these so I will know which one you are talking about?

(Testimony of Jack Lester Pinkerton)

Q. All right.

A. Now which one are you talking about?

Q. Do you call the whole thing a valve? A. No.

Q. What do you call the black part?

A. That is the cap or lid.

Q. Has that lid got two openings in it?

A. Yes.

Q. When did you first start making those two openings in that cap or lid?

A. The latter part of '31 or early '32.

Q. Did you always put those in? A. Yes.

Q. Was that in the one down at Seal Beach?

A. Yes.

Q. When you open that single valve it causes the steam to go simultaneously into those two openings, doesn't it? [311] A. Yes.

Q. So there is no period of time between the operation of one valve or the other, is there? A. No.

Q. Is there any way that that could be operated to cause delayed action of the opening of one valve instead of the other? A. This valve here?

Q. Yes. A. No.

Q. The device that is accused and charged to infringe, as shown in your catalogue, however, is susceptible to that delayed action, isn't it? A. That is right.

Q. When did you first start making the valve that had that structure in it, that delayed structure in it?

A. We first started on that in the latter part of '37 or early '38.

Q. Your man testified that he first had a conference with you in '38; is that correct?

A. He had them every day.

(Testimony of Jack Lester Pinkerton)

Q. I mean on that particular structure.

A. I couldn't answer if he did that morning or not.

Q. What did you say to him when you told him to make that structure? [312]

A. I would say I issued an order.

Q. I don't want to know what you would say; I want to know what you did say.

A. I asked him if he would make it.

Q. What did you give him to make it from?

A. The castings.

Q. Where were the castings made? Did you make the castings before you had drawings?

A. Possibly our first one from a sketch.

Q. That is what I meant. Have you got that sketch?

A. No.

Q. Have you got any sketch to show the structure that was installed at Seal Beach? A. No.

Q. Have you got any record at all to show the exact structure that was down there at Seal Beach.

A. We have not.

Q. You just rely solely on your memory, is that right?

A. We haven't the records.

Q. You are relying solely on your memory as to what was put in there, is that right? A. Yes.

Q. Have you the sketch that you used to give the draftsman to make the drawings in 1937 and '38 for the infringing structure? [313]

A. I don't understand what you mean, the "infringing structure."

Q. The one that it is charged to infringe as shown in your catalogue, Exhibit 11.

A. Will you repeat the question, please?

(Testimony of Jack Lester Pinkerton)

(The last two questions were read by the reporter.)

The Witness: I will have to ask you to repeat it again.

(The questions were reread by the reporter.)

The Witness: I don't have the sketches for our structure, no.

Q. By Mr. Jamieson: Are you familiar with the Blanchard structure? A. I have seen it.

Q. When did you first see one?

A. It was either late '38—I would say late '38.

Q. Where?

A. In the Valley. I don't remember if it was in the Wrigley field or the Rio Bravo field.

Q. Did you ever see any of their catalogues?

A. Do you mean up until now?

Q. No. Have you ever seen any of their catalogues?

A. Yes.

Q. When did you first see one?

A. I would say approximately around the same time.

Q. When is the first time that you ever heard of the [314] plaintiff's structure?

A. That I don't remember.

Q. You don't remember?

A. Not the first time.

Q. Did you see the plaintiff's structure at the Standard Oil that was installed in '34?

A. No. Do you mean have I ever seen it, now?

Q. Yes.

The Court: Did you see it in '34?

Q. By Mr. Jamieson: Did you see it in '34 is my first question. A. No.

(Testimony of Jack Lester Pinkerton)

Q. My second question is, did you ever see it, that particular one?

A. I don't know the number of this plant, so that I couldn't answer.

Q. Referring to this Exhibit B, which has been offered in evidence, do you consider that in an advanced state of disrepair?

A. Would I consider this in an advanced state of—

Q. Disrepair. Does it look like it has been neglected?

A. Which part of it do you mean?

Q. All of it.

A. I would say it has been used. [315]

Q. Does it look like it has been neglected? Has it been serviced? A. Has it been serviced?

Q. Yes. A. I can't answer that.

Q. Well, I will ask you to compare that, then, with Exhibit 5. Tell me if there is any difference between the two.

A. One is used and the other one hasn't been used.

Q. Does Exhibit 5 work as easily as yours does, as your device shown in Exhibit 12?

A. This valve does not.

Q. It works freely, doesn't it?

A. Yes, that works free.

Q. Now, then, if Exhibit B doesn't work free, it is because it has been rusted by neglect, isn't that true?

A. Not necessarily.

Q. Why not? A. Because of corrosion.

Q. Well, corrosion or rust. I use the words the same.

A. There is a lot of difference between corrosion and rust.

The Court: I do not think it is material to take that up.

(Testimony of Jack Lester Pinkerton)

Mr. Jamieson: They went into it, so I was trying to [316] clear the matter up.

Q. By Mr. Jamieson: Where did you get this Exhibit B?

A. I can't answer it. I picked up several of them. I picked up 15 or 20 they asked me to service.

Q. Did you get it in a junk yard? Do you know where it came from?

A. That particular one I think came from the Superior Oil Company of Ventura.

Q. Where was it when you found it?

A. They had it put away in a desk, I believe, in what they call their dog house. In fact, there were several they had laying in there.

Q. Why was it put away?

A. They were froze up. In fact, I went to the Superior Oil Company there and they showed me these valves. I suggested to them, in order to free them, to knock their pins out. They had some practically new. If you want the story, I am going to give it to you, unless somebody stops me. They had one practically new in there that was frozen up. I suggested to them taking the pins out and file these, free them up so that they could work. The idea was to help the customer up there that had them on the job.

Q. Have yours ever become corroded or rusted, your valves, like Exhibit 12, through neglect of the customers?

A. I wouldn't say neglect. That depends on the [317] condition of your water.

Q. Have you ever seen any of yours that were frozen like Exhibit B?

A. No.

(Testimony of Jack Lester Pinkerton)

Q. Have you ever seen any of yours that were frozen?

A. No.

Q. Any of them that were rusted or corroded?

A. I would say no.

Q. Is there something in yours that prevents it from being corroded? Is there something in the material from which it is made?

A. Bronze won't corrode, and neither will stainless steel.

Q. Is yours made of bronze or stainless steel?

A. One is stainless steel.

Q. What is Blanchard's made of?

A. Your rollers, I can't answer. That is your trouble, your rollers in there.

Q. Calling your attention to Exhibit 5, is that made of stainless steel?

A. I would say the outside body, your valve stems and your arm. Understand, I am not an expert on stainless steel. I would say yes.

Q. About this Ohio explosion that you were telling us about, did you investigate that personally? [318]

A. We had equipment out there.

Q. Did you see the job after the explosion?

A. Yes, a couple of weeks or a week afterwards.

Q. What did you see?

A. I seen where the boiler had been blowed up.

Q. Did you see any Blanchard equipment on it?

A. Yes. It had alarms and fuel valves, and my water regulators.

Q. Was there any mud in the water?

A. No, they can't operate boilers or drilling rigs with mud in them.

(Testimony of Jack Lester Pinkerton)

Q. Do you know why they said it blew up?

A. That I don't know. Low water, we know.

Q. On this structure that was down at Seal Beach did you have a leather cup like you have in your present structure?

A. In the cylinder you mean?

Q. In the cylinder, yes.

A. Yes.

Q. Did that leather cup act as a seal?

A. Yes.

Q. Do you consider that an equivalent or the same thing as the Blanchard diaphragm?

A. The same thing, no.

Q. What?

A. I can't call it the same thing, no. [319]

Q. Do they do the same work in substantially the same way?

A. I would say yes.

Q. Referring to this Exhibit 5 and our Exhibit 12, would you say that the lever arms do the same work in those two in substantially the same way?

A. You mean as the water raises and lowers do they travel with the float?

Q. Yes.

A. Yes.

Q. Does your float work substantially the same as the float on Blanchard's?

A. Every float that is in a column—

Q. Answer that one question. Do they both work the same?

A. Does the float raise and lower, float in the water?

Q. Yes.

A. Yes.

Q. As the float lowers in the Blanchard device, Exhibit 5, would you say that the first valve to be unseated is the valve to the whistle?

A. I don't know what you mean the first valve to be unseated, but I would say the one with the shortest slot in it. I don't know how he has them constructed.

(Testimony of Jack Lester Pinkerton)

Q. Then we will take yours, Exhibit 12. As the [320] float lowers which valve unseats first, which valve opens first? A. This one (indicating).

Q. What does that lead to?

A. To your whistle.

Q. Which valve opens second?

A. The one that is on this short lever to your fuel valve.

Q. How much of an interval is there between the opening, in point of time?

A. Between five-eighths and three-quarters of an inch.

Q. How much of an interval does that amount to in the height of the water in the boiler?

A. That is what I mean, five-eighths to three-quarters of an inch.

Q. How much of an interval does it amount to in time between the two?

A. There would be no answer for that. That depends on how you pull boilers, under what condition or load. There is no time element for that.

Q. In the average case how long is it between the time that the whistle blows and the time that the fuel is shut off? A. There is no answer to that.

Q. Approximately. [321]

A. There is still no answer for that. A man can go out there with the boiler sitting idle and it can sit there all day and never drop. But if it is under a 300 per cent overload it can drop in two minutes.

Q. How much time does the fireman have to come and take care of the water from the time the whistle blows to the time his fire goes out?

A. If they are idle it can take half a day.

(Testimony of Jack Lester Pinkerton)

Q. What advantage is there in having two valves, then, instead of one?

A. In case he goes to some place and they are under working conditions, then a matter of a few minutes makes quite a difference.

Q. How much time has he got to get there?

A. That goes back again to what we just got through saying. That depends on what they were doing.

Q. When you go to sell one of these valves, what do you tell the prospective purchaser on that subject?

A. That is, how much the water would drop and be on that point, there is nothing we can tell a man if he knows what he is doing that would do us any good, because he knows. The time element is governed by the amount of load, the size of your drilling rig, the size of your boilers; there is a lot of elements that can enter into it. So there is no answer for a time element. [322]

Q. When you go to sell one of those you have to sell it to him on the basis—

A. It is a low water alarm and a low water fuel valve shutoff.

Q. What advantage do you tell him there is in having the two together?

A. One is for a warning, whistle or alarm, and the other is to cut out the fires.

Q. What interval do you tell him there is between the two?

A. That we don't tell him. I don't tell him.

Q. What do you tell him is the advantage of having the two?

A. The safety for boilers.

(Testimony of Jack Lester Pinkerton)

Q. Why is it safer with two valves instead of one?

A. One acting as a fuel valve low water, if they are in operation and working condition, will put out the fires.

Mr. Jamieson: Would you mind reading that?

(The answer was read by the reporter.)

Q. By Mr. Jamieson: In your structure that you are now making the fires are put out by shutting off the fuel valve, isn't that true? A. Yes.

Q. And that is shut off a period of time after the whistle blows, isn't that true? [323]

A. What does the word "period" mean?

Q. You don't know what "period" means?

The Court: A lapse of time is a period of time, any lapse of time is a period of time.

A. Yes, yes.

Q. By Mr. Jamieson: On the other hand, on this device that is not an infringement, this Exhibit E and F, they operate simultaneously, don't they? A. Yes.

Q. Is there an advantage in having a lapse of time between the operation of the whistle and the operation of the fuel cutoff valve?

A. That depends on the conditions you are working under, or what job you are working under.

Q. Is it more expensive to make the one you are making now than the other one? A. Yes.

Q. Do you charge more for that one than the other one? A. Do you mean now?

Q. Yes. A. Yes.

Q. Why would anybody pay more for that? There must be some advantage.

A. Pay more for what?

(Testimony of Jack Lester Pinkerton)

Q. For the one that has the lapse of time between the [324] time the whistle blows and the time that the fuel is shut off.

A. Your conditions in the oil field has made that. When we made that—it is out for remote plants.

Q. Do you consider that as an advantage?

A. Under the present conditions, yes. Under them conditions, no.

Q. When you made that installation in Seal Beach you made it in approximately 1933, didn't you?

A. The question again, please?

(The question was read by the reporter.)

The Witness: '32.

Q. By Mr. Jamieson: When did you next sell or install a device like that?

A. I do not know the correct dates.

Q. The earliest record you have there is 1938?

A. Records is very hard to get. I can name a few small operators.

Q. Have you got any record of any sale between 1932 and 1938 of the device which you call Exhibit E and F?

A. Between '32 and '38?

Q. Yes.

A. I can't remember any specific date, no.

Q. You don't know of any single sale that was made between 1932 and 1938, is that right?

A. We have evidence there—or am I allowed to look [325] at them?

Q. Of your own memory you don't remember making another sale after that?

A. I would say yes.

(Testimony of Jack Lester Pinkerton)

The Court: He says he can't fix a date but he made many sales.

The Witness: I said yes, we made sales.

Q. By Mr. Jamieson: Between 1933 and 1938?

A. Yes.

Q. When did you make one?

A. I can't give you the correct date.

Mr. Fulwider: Could I inject a minute?

The Court: Let's not comment on the evidence. I know what the evidence is.

Mr. Fulwider: I was going to say that we have some coming, but they didn't get here today, from Petroleum Securities Company. There was a slip-up.

The Court: You don't think this case is going on indefinitely, do you?

Mr. Fulwider: No. That is why I didn't say anything about it before.

The Court: All right.

Q. By Mr. Jamieson: Referring to this Exhibit N, I call your attention to this first order that says J. L. Pinkerton Company, January 22, 1938. Do you have any order [326] earlier than that?

A. Not with me.

Q. Did you make a diligent search for those orders before you came to court? A. Yes.

Q. This was the earliest order that you could find, is that right?

A. No. We have one for the Petroleum Securities that isn't here now, that was in '35.

Q. You haven't offered that in evidence?

A. Not yet. It is on its way here now.

(Testimony of Jack Lester Pinkerton)

Q. This one that is dated in '38 doesn't have a fuel valve on it, does it?

A. There was quite a number of them didn't.

Q. That one has no fuel valve, does it?

A. No, it hasn't.

Q. So that one really shouldn't have been offered, should it?

The Court: Don't ask him about that. Don't argue with him.

Mr. Jamieson: That is right. I withdraw that question.

Q. By Mr. Jamieson: What is the first one that does show a fuel valve on it, the first order? The next one doesn't show a fuel valve either? Withdraw the question. The next one dated 1940 doesn't show a fuel [327] valve either, does it? A. It does not.

Q. So that that one has no fuel valve. The next one is dated 4-3-40. Does that show a fuel valve?

A. Yes.

Q. It says "Type X-1746."

A. That is type Y.

Q. What type is that?

A. That is referring to the one that is down there (indicating).

Q. That was sold in 1940, 4-3-40, is that right?

A. Yes.

Q. That was the first sale, namely, in 1940, that you have any record of since 1932 of the device known as Exhibit E and F?

A. You are speaking of records?

(Testimony of Jack Lester Pinkerton)

Q. Yes.

A. Outside of the Petroleum Securities that is coming in. But here, yes.

Q. And you have not been able to find any other record of a single sale from 1933 to 1940 except this one, is that right? A. Nineteen when did you say?

Q. 1932, we will call it, until 1940, a period of eight years. During eight years you didn't make a single [328] sale of Exhibit E and F?

A. Here is one now, '38.

Q. That has no fuel valve on it.

A. What do you mean, fuel valve?

Q. Yes. A. I haven't the record here.

Q. You didn't sell a single fuel valve from 1932 to 1940? A. Yes.

Q. There is no record here of any fuel valve sales?

A. It is very hard to get records over six years back.

Q. And you have no record of any sale from—

The Court: You have asked that question half a dozen times and he has answered it. He has said he has made sales but he has no records.

Q. By Mr. Jamieson: You say you have made a sale without a record? A. Yes.

Q. How many sales?

A. That I can't be positive. I would say any place from 25 to 100.

Q. And you can't find any record of it?

A. Lots of those small operators—

The Court: I would appreciate it, Mr. Blanchard, if you would sit down please. It is proper for a lawyer to stand [329] up, but it is not proper for a litigant or a witness to stand up.

(Testimony of Jack Lester Pinkerton)

Mr. Blanchard: Excuse me.

The Witness: That question again, please.

Mr. Jamieson: Maybe he will talk louder if I stand back here.

The Court: If he is hard of hearing he may come up closer, but it is not proper for him to stand.

Mr. Jamieson: May he sit in the jury box?

The Court: Yes. If he would have told me he was hard of hearing I would have let him sit there.

Mr. Jamieson: I didn't know it either.

Will you read the question?

(The last question was read by the reporter.)

The Court: I suggested that it has been asked and answered many times.

Q. By Mr. Jamieson: Do you know of any installation of a fuel valve other than the one at Seal Beach between 1932 and 1938, any individual installation?

A. That we had? Yes.

The Court: All right. Then name some of the companies and places.

The Witness: We put some on for the small operators, the Hoyt people.

Q: By Mr. Jamieson: When did you put that in? [330]

A. I would say some time approximately around '33 or '34. Also Sepple, C. G. Julian in Santa Fe Springs.

Q. When did you put that in?

A. I would say around '34 or '35.

Q. Do you know of any others?

A. The Elmer Oil Company in Venice.

(Testimony of Jack Lester Pinkerton)

Q. Did you inquire of any of them before this trial to see if they had anybody that remembered it?

A. Most of them little companies was absorbed, taken over, or changed names.

Q. Did you look for them?

A. I looked for some. Some I didn't. I didn't have time. I still had to work for a living. You fellows have taken so much of my time the last couple of years. You don't give me time to do anything.

Q. I haven't taken any of your time.

The Court: Let's not get into any arguments.

Q. By Mr. Jamieson: Are you familiar with the patent in suit? A. In what way do you mean?

The Court: The paper patent.

A. Yes, I have read it.

Q. By Mr. Jamieson: Have you compared the structure of the patent in suit with your own structure?

A. I am not familiar with patents, so I left that to [331] Mr. Fulwider.

Q. So you know nothing about what the patent covers or what structure it is, is that right; you leave that up to your lawyer? A. That's right.

The Court: He is a smart man.

The Witness: Thank you.

Q. By Mr. Jamieson: Referring to these valves in evidence, I will first direct your attention to this Exhibit 5 and ask you when the float lowers and the rod or arm member lowers, it pulls off of the seat one valve, doesn't it? A. Yes.

Q. Now, then, referring to your structure Exhibit 12, when the arm of that structure lowers it pulls one valve off its seat, doesn't it? A. The first, yes.

(Testimony of Jack Lester Pinkerton)

Q. Now, then, comparing the operation in the way that those two valves operate, they operate exactly the same way, don't they? A. No.

Q. Is there any difference between the operation of the first valve coming off its seat in Blanchard's Exhibit 5 and in your device Exhibit 12; is there any difference in the way they operate? [332]

A. In the first valve?

Q. Yes, the first valve. They operate exactly the same? A. I would say the same.

Q. The first valve? A. Yes.

Q. So, so far as the first valve is concerned yours does the same work and it does it in the same way as Blanchard's, doesn't it?

A. And many others, yes.

Q. Answer that one question.

A. And many others, I said.

The Court: That is an explanation.

Mr. Jamieson: He didn't say yes, your Honor.

The Court: He doesn't have to. His answer is a positive answer. He merely added that feature "as it is in others."

Mr. Jamieson: I move to strike that as not responsive.

The Court: That is not a ground in this court, it is only a ground in the State court, because of a recent statute, and we don't follow it.

Q. By Mr. Jamieson: Is there any additional function performed by the moving of the first valve off its seat in your structure than is performed by the moving of the first valve off its seat in the Blanchard? [333]

A. Is there any difference in my first valve and Blanchard?

(Testimony of Jack Lester Pinkerton)

Mr. Jamieson: Read the question.

(The question was read by the reporter.)

The Witness: Didn't I answer that?

Q. By Mr. Jamieson: No, you didn't.

A. The first valve, I said, was the same as Blanchard and many others.

Q. That wasn't my question. That was the previous question. I have asked another question since then,

The Court: It is the same question. Ask another question. I can't see any distinction between the two.

Q. By Mr. Jamieson: Does your valve do anything in addition to what Blanchard's does, the first one?

A. No.

Q. Now, taking the second valve, when the arm moves lower due to the lowering of the float in Blanchard's structure Exhibit 5, it moves the second valve off its seat, doesn't it? A. As it lowers down further, yes.

Q. What does that do in the way of work, what result does that accomplish?

A. That would open his second valve.

When you open the second valve that also closes the fuel shutoff valve, doesn't it? [334]

A. Depending on what he uses it for.

Q. If that is hooked up to it? A. Yes.

Q. Now, referring to yours, when your second valve is pulled off of its seat by the lowering of the arm, that will also shut the fuel shutoff valve if it is hooked up to it, won't it? A. That is correct.

Q. Will the lowering of the arm in your device perform any additional function than shutting the fuel

(Testimony of Jack Lester Pinkerton)

shutoff valve after it has progressed past the opening of the first valve?

A. It could be used for many things, but the operation of the second valve—could I do anything else besides shutting off fuel? Yes, anything pertaining to going through the line.

Q. If the second valve is hooked up to the fuel shutoff in your device, the lowering of the arm past the point where the first valve is opened to the point where the second valve is opened will not perform any additional function or work than opening the fuel shutoff valve, will it?

A. Do you mean closing it or opening it?

Q. I mean closing it. I am sorry.

A. Yes, it will close it.

Q. It will close it? [335] A. Yes.

Q. It doesn't do anything else besides close it?

A. That is all.

Q. So that the work that the second valve in your structure, Exhibit 12, does, and the work that the second valve in the Blanchard structure, Exhibit 5 does, is exactly the same, isn't it?

A. I would say the job was the same, yes.

Q. And the job is to shut that fuel shutoff valve?

A. If you are hooked to a fuel valve, yes.

Q. Assuming they are both hooked to a fuel shutoff valve, does your device do that job in the same way that Blanchard's device does it?

A. From the pressure of the boiler.

Q. Does it do it in the same way?

A. Will you repeat that, please? I want to see if I understand you.

(Testimony of Jack Lester Pinkerton)

(The question was read by the reporter.)

A. They use a diaphragm and we use a piston.

The Court: He is asking you for the result.

The Witness: Yes.

Q. By Mr. Jamieson: The result is exactly the same?

A. Yes.

Q. And the way that that result is accomplished is the same in both valves, isn't it? [336] A. Yes.

Q. Now, then, in your device you have made the second valve in two pieces so that there is an extension on it, haven't you?

A. You mean two valves? Each valve is made in one piece.

Q. Referring to Exhibit 12 you have two pieces instead of one like Blanchard has?

A. Two pieces between that.

Q. Between the valve and the pin?

A. Do I have two pieces between the valve—are you speaking of this pin (indicating)?

Q. If it isn't clear, I will reframe the question. Referring to Blanchard's device, Exhibit 5, the valve is inside and isn't seen, isn't that true?

A. The valve seat is.

Q. You can't see it, it is inside?

A. Yes, the valve seat.

Q. Between the valve seat and the pin in Blanchard's, there is just one piece or member, isn't there?

A. There is just one valve.

Q. One piece of mechanism? A. Yes.

Q. And between the valve seat and the pin in your device there are two pieces of mechanism, aren't

(Testimony of Jack Lester Pinkerton)

there, [337] whatever you call them, they are two pieces of mechanism? A. Yes.

Q. The one piece of mechanism in Blanchard's and the two pieces of mechanism in yours perform the same identical work, don't they?

A. Yes, they open the valve.

Q. And they do it in substantially the same way, too, don't they? A. I would say no.

Q. Well—

A. (Continuing) Yours is operating on one pin; we have two levers and two separate valves.

Q. When the valve is pulled off of its seat in the Blanchard device, Exhibit 12, it is pulled off its seat by movement of the pin in a direction away from the seat, isn't that true? A. Yes.

Q. And that pin is connected to the valve by a slot, isn't that true, in the end of the valve?

A. Connected to the pin?

Q. The pin is connected to the valve by a slot in the end of the valve? A. Yes.

Q. And in your device the two pieces are connected to the pin by a slot in the end of one of them. isn't that true? [338]

A. In the end of one of them? I don't understand.

Q. The two pieces. A. In the arm.

Q. Withdraw that question. I will start over again.

Between the second valve seat in your device and the pin there are two pieces, aren't there? A. Yes.

Q. And the connection between the pin and those two pieces is affected by a slot in one of the two pieces, isn't that true? A. Yes.

(Testimony of Jack Lester Pinkerton)

Q. And that slot contacts—correction. That pin contacts the edge of the slot and opens the valve, doesn't it?

A. It pulls the lever down, and the valve being hooked onto the lever opens the valve, yes.

Q. And it is the contacting of that pin on the edge of that slot that causes the valve to come off of its seat in your device Exhibit 12?

A. Do you mean the slot on the second arm?

Q. Yes. A. Yes.

Q. In Mr. Blanchard's device it is the contact of the pin on the slot of the second arm that pulls the valve off the seat? [339]

A. He hasn't got the second arm.

Q. I didn't say "second arm."

A. I am sorry I misunderstood.

Q. I will reframe the question. It is the contact of the pin on the slot of the second valve that pulls the valve off its seat in Blanchard's? A. Yes, yes.

Q. So in so far as that operation of a pin contacting a slot is concerned, the two structures operate exactly the same, don't they?

A. No. One slot is in the valve, and the other is on the arm.

Q. But they perform the work in exactly the same way, don't they?

A. Not exactly the same. You get the same results.

Q. They achieve that result in substantially the same manner, don't they? A. No. [340]

* * * * *

(Testimony of Jack Lester Pinkerton)

The Clerk: There is still one exhibit that was overlooked.

Mr. Fulwider: I offer F-5 in evidence.

The Court: All right.

The Clerk: Exhibit F-5 in evidence.

(The exhibit referred to, heretofore marked Defendants' Exhibit F-5, for identification, was received in evidence.)

Q. By Mr. Jamieson: Mr. Pinkerton, I will refer you to Exhibit H, which is a drawing of an assembly. Where was [341] that installed?

A. No place in particular. That was just an installation drawing.

Q. Was this made in 1935?

A. Whatever that date is.

Q. What was the occasion of making that drawing if it was not installed? You wouldn't make this for the Seal Beach installation, would you?

A. No. We made that because we was going to continue selling them.

Q. Was anything made from this drawing?

A. Do you mean installations?

Q. Yes. A. Yes.

Q. Where?

A. A job that was made for the Elmer Oil Company in Santa Fe Springs.

Q. Did you make a drawing like this for the Seal Beach installation?

A. No. This covered all installations for that particular style. If you had a series of boilers—

Q. This was made in 1935?

A. That is correct. The same as we made any drawing—

(Testimony of Jack Lester Pinkerton)

Q. Did you make a drawing of the 1933 installation afterwards; is that what this is? [342]

A. That was just our standard installation for this type of boiler, no particular job or nothing, the same as there are for our others.

Q. Then this doesn't purport to be a drawing of what was down there in '33? A. No, no.

Mr. Jamieson: That is all, your Honor.

Mr. Fulwider: I have two exhibits that I would like to introduce.

Mr. Jamieson: I have another witness.

The Court: What did you say?

Mr. Fulwider: That is all I have of this witness. Just one question.

Redirect Examination

By Mr. Fulwider:

Q. Did you make any sales other than the ones you mentioned to Mr. Jamieson on cross examination of this old low water system? A. Yes.

Q. Can you think of any of them now, with the names of the customers, between 1932 and, say, 1938?

A. I believe there was a chemical company, and I would have to get the name, over in Redondo. That is still in operation.

Q. How about the Petroleum Securities? [343]

A. That I thought we had referred to here. That is on its way here. Yes, Petroleum Securities, some time in '35.

Q. Where was that? A. In Kettleman Hills.

Mr. Fulwider: That is all.

The Court: All right. Step down.

(Witness excused.)

Mr. Fulwider: I would like to introduce this catalogue sheet of the Reliance Company, which illustrates this Exhibit A. I would like to call it A-1.

The Court: All right.

The Clerk: That is Defendants' O in evidence.

Mr. Fulwider: I thought we should mark it A-1.

The Clerk: A-1 in evidence.

(The document referred to was marked Defendants' Exhibit A-1, and was received in evidence.)

Mr. Fulwider: One other exhibit, a drawing of the old Exhibit F.

The Court: All right.

The Clerk: Defendants' O in evidence.

The Court: All right. [344]

* * * * *

ALVA G. BLANCHARD,

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jamieson:

Q. Mr. Blanchard, will you give the sales of your devices covered by the patent in suit from the beginning, year by year?

A. I don't have my records prior to 1942, but from '34 to '41 I would estimate that we have sold \$100,000 worth of them. Then in '42 our sales were \$9,600.02. In '43 our sales were \$17,269.63. In '44 our sales were \$27,956.40. In '45 they were \$41,159.05. In 1946 they were \$55,938.90. In '47 they were \$58,531.79. That would make a total of—

(Testimony of Alva G. Blanchard)

Q. I don't care about the total. Will you refer to patent No. 2,233,395 and tell me if there is an element in that patent of "means for supplying fluid under pressure to said compartment"? Do you find that?

A. Yes.

Q. Will you turn to the specifications and point out the part of the specifications and drawings that that element refers to? You may come down and illustrate it by the exhibit, if you wish. [345]

The Court: What are we looking at, which patent?

Mr. Jamieson: 2,233,395.

The Court: What figure are you looking at?

The Witness: We can start on figure 3.

The Court: Aren't you going over the same matter that you covered in his direct examination?

Mr. Jamieson: No, I am not. I wouldn't repeat anything.

The Court: All right.

Mr. Jamieson: I am not going over anything that I covered in my case on direct.

The Court: I just want to make sure.

Mr. Jamieson: I am trying to hurry. I am just as anxious to get through as you are, your Honor.

Q. By Mr. Jamieson: Will you please refer to the specifications and read the part of the specifications that refers to that element in each of the claims of that patent?

A. On page 2, the second column, beginning at line 17:

"In this instance, valve 75 is normally yieldingly held open by springs 77 but, should the water level in the boiler recede below the point where the valve 45 in the water supply conduit will be opened, as

(Testimony of Alva G. Blanchard)

above described, and beyond the point where the whistle 26 will be sounded, then, in that event valve [346] 13 in the master control unit will be opened and steam will pass through pipe line 25a into upper chamber 71 and lower chamber 72, with the result that diaphragm 73 will be flexed downwardly and valve 75 closed, thus shutting off the supply of fuel to the boiler."

Q. Is that the means that is referred to in that element of the claims in issue? A. It is.

Q. Will you show it and point it out on the drawings?

A. The first valve in a double valve assembly would be valve No. 12 in figure 2. And when it is drawn off from its seat the steam will pass through the seat 15 and the opening 16 into the connection 24 to which the whistle is attached.

A further recession of the water brings the pin 9 against the back of the last valve, which is No. 13, and it is moved from its seat 15 opening the opening 16 and steam passes from that opening on through the line 25a down to the top of the fuel shutoff valve with the connection 25a and the top of it, and that is the pressure that operates the fuel cutoff valve.

Q. Is that element of the claims present in this structure Defendants' Exhibit H? Show it to the court.

A. That element is not present in this drawing [347] dated 7-1-35, because the alarm body has only one valve in it, and it, therefore, could not be the last valve to open in a sequence of operations.

Q. Is that structure present in the defendants' device shown in Plaintiff's Exhibit 11? A. It is.

(Testimony of Alva G. Blanchard)

The Court: Where?

The Witness: That is a double valve assembly here (indicating).

The Court: Mark it with a red pencil on Exhibit 11.
(Witness does as requested.)

The Court: Anything further?

Mr. Jamieson: I had a lot more, but I am trying to cut it out so I could finish here, your Honor, if I could just have a second.

The Court: All right.

Q. By Mr. Jamieson: Is the structure of your patent present in that structure that was described at the Seal Beach installation? A. No, it is not.

Q. Why not?

A. Because the fuel cutoff valve and the whistle operate simultaneously from the pressure emanating from a single valve.

Mr. Jamieson: Your Honor, before I ask the next [348] question I would like to ask a question of you.

At the close of the trial yesterday the defendant named six patents as the ones which he considered the closest references. I feel that it would be of considerable assistance to have this witness explain just those six patents. It might help your Honor considerably in your labors, and I would like to do that.

The Court: I have no objection. He didn't have an expert, and I thought you could do the explaining. If he can do it briefly, he can do it now.

Mr. Jamieson: I would like to have him explain the structure of those six patents.

(Testimony of Alva G. Blanchard)

Mr. Fulwider: I dislike to say I am not going to confine my argument to six patents. Your Honor asked us what the best ones were.

The Court: Let the record show that counsel will be given an opportunity to give their views of their interpretation of any of the patents. I asked them to bring it down to the best references, which is our custom in these cases. If he can do it briefly, all right.

Q. By Mr. Jamieson: Take the six patents that were pointed out by the defendant as his best references and explain any differences that you find between them and your structure. I will hand you copies of them for that purpose. I will give you copies of the patents to Parker, Sutherland, [349] Horridge, Spiller, Baldwin, and Wright.

A. Should I briefly outline what the evidence is?

Q. Just explain briefly how it works to the court to save time of reading it, and show the elements that are not present in each one of them.

Mr. Jamieson: There are no exhibit numbers on those, but they are listed there.

The Court: I will get it. Which one are you starting with?

The Witness: I will start with Parker.

Mr. Jamieson: It is No. 1 on the list. I have them listed by number. Parker is No. 1965,052 issued July 3, 1934.

The Court: Go ahead.

Q. By Mr. Jamieson: Explain briefly how it operates and any differences between it and your structure.

(Testimony of Alva G. Blanchard)

A. Well, it operates from a lever outside of the housing, which mechanically opens the valves controlling the water level alarm and fuel control valve.

Q. What is the number of each part you mentioned?

A. The number of the valves that it opens outside of the structure is No. 23, 38, and 27.

Q. What differences are there between that structure and the patents in suit?

A. The difference is that these valves that are operated by this lever are of a plug type and hard to turn, [350] and the only power to operate is the weight of the water that the float displaces on the inside, and the friction of the packing on the float rod extending through the housing and the glands of valves make it extremely doubtful if the device was ever used.

The distinguishing features as to claim 1 is that the valve, fuel cutoff valve 31 shown in figure 1, and also in figure 8, has no diaphragm or the equivalent. A piston ring, of course, is not a seal as there must be a certain amount of clearance between a cylinder and a piston, and this leakage would defeat the use of it in a fuel cutoff valve which must positively retain all of the pressure in it to keep the valve closed. Having no diaphragm it has no protective liquid for said diaphragm in the compartment.

The next difference is it can have no connections between said diaphragm and valve because there is no diaphragm or equivalent in the valve.

And then it has no means for supplying the fluid under pressure to the compartment for flexing said diaphragm, such as steam from the last valve to open in sequence in

(Testimony of Alva G. Blanchard)

downward movement of the float in a multiple valve structure within the housing of the steam source.

The next difference is that it has no manually operable means for relieving the fluid pressure on the said diaphragm.

In figure 31—I mean in figure 6 the body 31 has [351] a bleedoff protective—a bleedoff connection, and if the valve was bled there it would bleed any protective liquid that might be on the sealing unit if there was a sealing unit in the cylinder, and there is not.

That is the differences as to claim 1.

For claim 2, it has no means for its supplying fluid under pressure to said compartment to force said fluid against the pressure-responsive means. That is for the same reason that it has not in claim 1.

Then it has no manually operable means to relieve the fluid pressure in said compartment for the same reason that it didn't have in claim 1.

The Court: I don't think counsel expects you to compare the claims with yours. He wants you to compare the structure. Isn't that true?

Mr. Jamieson: Yes.

The Court: Go to the next one.

Mr. Jamieson: Just the features.

The Court: The features; not the comparison of the claims.

The Witness: All right.

The Court: What is the next one?

Q. By Mr. Jamieson: The next feature that is missing in that and is present in yours?

(Testimony of Alva G. Blanchard)

A. And it has no non-return means to prevent the [352] backflow of fluid from said compartment. That is to say, when the pressure on top of the cylinder in figure 1 on the top of the valve 31, and it shows in figure 8, also—when the pressure that is holding that valve down is removed, which it will be by the closing of the valve 38, the weight 35 immediately begins opening the valve and it exhausts out the top 29, and as it exhausts it turns on again, and the device never was supposed to be a fuel shutoff valve, but merely a valve to cut down on the fuel as long as the water was low.

The Court: What is the next one?

Q. By Mr. Jamieson: What is the next patent?

A. The next patent is Sutherland, C. W. Sutherland, No. 1,209,355.

Mr. Jamieson: That is No. 3 on the list, your Honor.

A. This is a fuel shutoff device—I mean a feed water regulating device, and the valve No. 12 stays normally open, except when the water raises too high. When the water raises too high the float 42 pulls the valve 38 from its seat and that allows pressure to come up the line 33, 32, 29, and into the chamber 19 above the piston. That pressure is exerted on the valve 10 and it closes it and stops the flow of water into the boiler. When the water level in the boiler declines the float 42 lowers and the valve 38 closes the seat, taking the pressure or eliminating the flow of [353] steam into line 33, 32, 29 chamber, and when no more steam can come into it the pressure that is in it exhausts out the opening 31 of the top, and allows the valve to open by itself.

The difference is that it is not in combination with a fuel supply conduit. It is not shown in connection with

(Testimony of Alva G. Blanchard)

supplying fuel to a boiler. It has no means for supplying fluid under pressure to said compartment for flexing said diaphragm, such as we employ as the last valve in a series of valve openings to supply this pressure.

Then it has no manually operable means for relieving the fluid pressure in the diaphragm, because the opening 31 is open all the time.

That is all of that.

The Court: The next one. I think you have described yours sufficiently. If you will just state the feature, you won't need to repeat those, because your comparison is apparent from the comparison that you made with the other two. What is your next one?

The Witness: Horridge, No. 930,860.

The Court: I have it.

The Witness: This is a pump governor and is supposed to control the pressure of water in a pump, and the steam passes through this valve to the pump from the boiler, and then at the top of it there is a connection that goes to the [354] discharge end of the pump, and the idea of it is to set the pressure that the pump is going to discharge by setting the screw 21 against the spring 23, and whatever pressure you have that set the pump will carry it because when the discharge pressure gets above the point you have set this spring the pressure will come over and come down line 25 and shut the steam off to the pump.

It differs from ours in that it is not used in a fuel supply line, and it has no means for supplying the fluid under pressure to said compartment for flexing the diaphragm, such as we employ. That is the last valve to open, and so forth.

(Testimony of Alva G. Blanchard)

The last thing is that it has no manually operable means for relieving the fluid pressure on the thing, because it is a direct opening and there is no bleed opening on it anywhere.

The next one is C. E. Spiller.

The Court: All right.

The Witness: It is the same type of device for controlling the pump pressure, and the main difference is that it has no—it is not in connection with any safety apparatus. It has no steam line to it, it has no means for supplying the fluid under pressure to the cylinder to operate it, such as we employ. It has no diaphragm or the equivalent on the piston to provide a sealing means so the valve can be closed. [355] And it has no manually operable means for relieving the pressure on it to make it possible to use it as a fuel cutoff valve.

I take it the next reference is—

Q. By Mr. Jamieson: What is the name of it?

A. Baldwin.

Mr. Fulwider: Did I mention House the other night?

Mr. Jamieson: You didn't mention House.

Mr. Fulwider: I should have. He is about as good as Parker.

The Court: All right.

The Witness: Baldwin is No. 716,982.

The Court: All right.

The Witness: The main difference on this device is as shown on figure 1 the alarm body housing is attached to the side of it like all the rest of these alarms we have been discussing, and from the valve assembly on the side there is a connection I down to the bottom of a normally

(Testimony of Alva G. Blanchard)

open feed water valve. The operation of the device is that as long as the water level is up—I mean that as long as the water level is slightly low the water will go into the boiler, but should the water level slightly raise the float c will pick up the arm c^1 by means of the attachment c^2 and move the lever which is pivoted at c^5 until the pin c^8 comes in contact with the back end of the slot c^6 , and it is releasably [356] held against that pin all the time by a spring c^7 . As this pin—

Q. By Mr. Jamieson: What are the differences between that and your structure?

A. The difference is that this is a single valve structure, because all of our claims read that the separate valves are opened in a downward movement of the float and in sequence. And this device has only one valve that opens on a downward movement of the valve.

Q. What is the number of that valve?

A. That valve is No. c^{23} . As the water drops that is the only valve that can be opened by the downward movement of the valve.

Then the next difference is that it has no plurality of valves in it with slots of various lengths in their end to determine the order in which they are opened.

That is the chief difference as regards our patent No. 2,199,611.

Now, if you consider it in regard to the other valve—I mean the other patent, No. 2,233,395, it is a different type of valve than we have heretofore discussed, but the main difference is that it has no diaphragm or effective seal for it to make it leak-proof. As a matter of fact, at opening s^1 in Fig. 2, it even provides a bleed opening for any excess pressure that slips by the piston to

(Testimony of Alva G. Blanchard)

escape [357] at that bleed opening. Then it has no non-return means to open, because the line I that leads from the valve c^3 has a steam chamber H above it, and in the operation and closing of that valve whenever it is closed the steam in this chamber H will condense into water and thereby allow the valve to open by itself.

The Court: What is the last patent?

The Witness: The last patent is Wright No. 668,302. The Wright device is a steam trap and it is supposed to be used on a steam line for collecting the moisture out of the line and dispelling it without dispelling any steam pressure, and the moisture comes through the opening in the first figure at the upper right at a figure indicated a^7 . The moisture falls down into the bottom of the chamber and comes up on the inside around the float to the level indicated by the dotted line w. Any further raising of that float will cause the center lever which is attached to one of three valves in the device to open, and if this opening is large enough to take care of the condensing water that is falling into the trap no other valves will open. If there is increase in the moisture that the trap is supposed to take care of the float will raise further and another arm will strike one of the pins on the float rod indicated in figure 3 by the pins b^7 coming in contact with the arm g^2 . When this happens another one of these valves are open to [358] permit a greater discharge of moisture, and then if the moisture content increases the float will naturally raise a little further, and then the third ground—

The Court: This is a series of openings?

The Witness: Yes. The third valve comes up against another lever indicated by the pin b^7 —no, the pin b^5

(Testimony of Alva G. Blanchard)

coming in contact with the arm h^2 . In addition to that there is another opening at the top, which is indicated in figure 1—no, figure 3,—no, that is a little figure on the side—figure 1 is right, at the top there is a manual means indicated c^7 by which a valve is opened to allow more moisture to escape in case the three valves after they are opened can't permit the moisture to escape, so that a person is supposed to go there and open that up too. All of these valves empty into a single opening indicated at the top of the trap by the numeral c^2 , and the moisture travels to the left then and sharply down and out the side of the trap indicated by the numeral a^8 .

Q. What are the distinguishing features?

A. The principal distinguishing feature is that it has no plug to close an opening, such as a plug as we show on our housing to close that opening, and then it has no plurality of outlet passages through this plug, and therefore it has no plurality of valves through said housing, because this plug that these valves are in in this device [359] are within the device and the outlet to all of these openings is merged into one, so that it has only a single outlet a^8 .

The Court: All right.

Mr. Jamieson: If counsel wants, and your Honor wants him to discuss House we will do that. Otherwise we will close.

The Court: You may pass it.

Q. By Mr. Jamieson: Have you finished with the last patent?

A. No. It has other differences. It has no slots in the ends of the valve stems and it has no slots of different

(Testimony of Alva G. Blanchard)

lengths to produce the successive movements of the valves. And the whole device is not intended, nor could it accomplish the results that our patent does. That concludes Wright.

The Court: All right.

The Witness: Is there another one?

Mr. Jamieson: No. That is all.

Mr. Fulwider: No cross.

The Court: Step down.

All right, gentlemen, anything further?

Mr. Jamieson: No. The plaintiff rests.

[Endorsed]: Filed May 3, 1948. Edmund L. Smith, Clerk. [360]

[Endorsed]: No. 11991. United States Circuit Court of Appeals for the Ninth Circuit. Alva G. Blanchard, Appellant, vs. J. L. Pinkerton, Inc., and J. L. Pinkerton, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 27, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,991

ALVA G. BLANCHARD,

Appellant,

vs.

J. L. PINKERTON, INC., a corporation, and
J. L. PINKERTON,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF TO BE PRINTED, UNDER SUBDIVISION 6 OF RULE 19 OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Clerk of Said Court:

Sir: The points on which the appellant intends to rely on the appeal in the above case are as follows:

1. Since validity of the patents in suit and title thereto in appellant were found by the Court below and since no cross-appeal was filed herein by the appellees, these matters are not in issue on the appeal in this case.

2. Therefore the only main issue on this appeal is the infringement of the claims in issue of the patents in suit by the accused structures which the appellees admitted manufacturing, using and selling before the Complaint was filed herein.

3. The patents in suit are pioneer patents, or represent distinct steps forward in the art, and as such, are entitled to a liberal interpretation and a broad range of equivalents.

4. The appellees' accused structures shown in appellant's Exhibits 8, 9, 10, 11 and 12 are infringements of the claims in issue of the patents in suit, namely: Claims 1, 2 and 5 of Patent in suit No. 2,199,611 and Claims 1, 2 and 3 of Patent in Suit No. 2,233,395.

5. That the United States District Court for the Southern District of California, Central Division, erred:

(1) In ordering, adjudging and decreeing that the Complaint be dismissed.

(2) In failing to order, adjudge and decree that, without the license or consent of plaintiff, the above named defendants have jointly and severally, or jointly or severally, within the said Southern District of California, Central Division thereof, prior to the commencement of this suit, manufactured, offered for sale, sold, offered for use, used and caused to be used valve operating structures or devices which embody or contain the patented inventions disclosed and claimed in and by Letters Patent in suit No. 2,199,611, and particularly by Claims numbers 1, 2 and 5 of said Letters Patent No. 2,199,611.

(3) In failing to order, adjudge and decree that, without the license or consent of the plaintiff, the above named defendants have jointly and severally, or jointly or severally, within the said Southern District of California, Central Division thereof, prior to the commencement of this suit, manufactured, offered for sale, sold, offered for use, used and caused to be used safety apparatus for boilers or devices which embody or contain the patented inventions disclosed and claimed in and by Letters Patent in suit

No. 2,233,395, and particularly by Claims numbers 1, 2 and 3 of said Letters Patent No. 2,233,395.

(4) In failing to order, adjudge and decree that all of the elements of Claims 1, 2 and 5 of Letters Patent No. 2,199,611 of the mechanical equivalent thereof are found in defendants' accused structures.

(5) In failing to order, adjudge and decree that all of the elements of Claims 1, 2 and 3 of Letters Patent No. 2,233,395 or the mechanical equivalent thereof are found in defendants' accused structures.

(6) In failing to order, adjudge and decree that the defendants have infringed patent in suit No. 2,199,611, particularly Claims 1, 2 and 5 thereof.

(7) In failing to order, adjudge and decree that the defendants have infringed patent in suit No. 2,233,395, particularly Claims 1, 2 and 3 thereof.

(8) In failing to order, adjudge and decree that the accused devices shown or embodied in plaintiff's Exhibits 8, 9, 10, 11 and 12 infringe patent in suit No. 2,199,611, particularly Claims 1, 2 and 5 thereof.

(9) In failing to order, adjudge and decree that the accused devices shown or embodied in plaintiff's Exhibits 8, 9, 10, 11 and 12 infringe patent in suit No. 2,233,395, particularly Claims 1, 2 and 3 thereof.

(10) In failing to order, adjudge and decree an injunction upon Letters Patent No. 2,199,611, particularly Claims 1, 2 and 5 thereof.

(11) In failing to order, adjudge and decree an injunction upon Letters Patent No. 2,233,395, particularly Claims 1, 2 and 3 thereof.

(12) In failing to order, adjudge and decree that plaintiff is entitled to costs.

(13) In ordering, adjudging and decreeing that defendants shall recover and have execution for their costs and disbursements herein.

(14) In ordering, adjudging and decreeing that none of the Claims in suit or either of the above mentioned patents, No. 2,199,611 or 2,233,395, is infringed by the accused devices like plaintiff's Exhibit 12 herein, or by the accused devices shown in plaintiff's Exhibit 11 herein, or by the accused devices shown on the right hand side of each of plaintiff's Exhibits 8, 9 and 10 herein that were made, used or sold by either of the defendants herein prior to the filing of the Complaint herein.

And that the United States District Court for the Southern District of California, Central Division, erred in making the following Findings of Fact and Conclusions of Law entered in this action on June 7, 1948, to wit:

FINDINGS OF FACTS

II.

Plaintiff is restricted to his said filing date of October 14, 1935, as the date of invention for each of said patents.

III.

The specification of U. S. Patent No. 2,233,395 defines the invention as an improvement in safety devices for boilers, which, in view of the prior art must be limited to a safety device for boilers which produce automatic safety.

IV.

The claims of U. S. Patent No. 2,233,395 all describe, and must be specifically limited to, the fuel valve assembly described in the specification and depicted in the drawings. Claims 2 and 3 are by their terms limited to "non-return means to prevent back-flow of fluid from said com-

partment." The only "non-return means" disclosed or contemplated in said patent is the check valve 79 seen in Figure 6, and the claims are limited thereto. Claim 1, although it does not specifically recite the non-return means of Claims 2 and 3, must, in view of the specification and prior art be considered to include said check valve 79 by reference. As so limited said claims are valid.

V.

The automatic safety of the '395 patent apparatus is achieved by the action of the check valve 79, which holds the fuel valve 75 closed until the relief valve 78 is manually opened. This function of the check valve can only be accomplished by placing it below the level of the liquid standing in compartment 72 and the inlet to said compartment, so that when the check valve closes, it will trap only liquid in said compartment. Thus when the check valve has been closed the fuel valve 75 is locked in closed position, and can only be opened by manually opening relief valve 78 to permit the springs 77 to force diaphragm 73 upwardly to expel liquid from compartment 72.

VI.

The element appearing in all of said '395 claims, "means for supplying fluid under pressure to said compartment" must be read in the light of the specification to include any conduit means such as pipe 25a shown in the Blanchard drawings.

X.

The evidence shows conclusively that in late 1932 or early 1933 the defendant Pinkerton manufactured, and installed on a lease of the Continental Oil Company at Seal Beach, California, the boiler alarm and fuel valve control structures shown in Defendants' Exhibits E. E-1, E-2, F, F-1, F-2, F-3, F-4 and O. The details of said

structures are shown by said exhibits and were fully identified through the testimony of defendant Pinkerton and of disinterested witnesses Brown, Thorton and Dolarheid, all of whom took part in said installation at Seal Beach, the manufacture of said apparatus being conclusively shown by disinterested witnesses Harvill, Beck and Robson. The testimony of all of said witnesses in all respects is found to be clear, satisfying and convincing beyond any reasonable doubt. The dates on the drawings illustrating Exhibits E and F are found to have been fully proved.

XI.

The accused devices manufactured by defendant Corporation are substantially the same as the early devices manufactured by Pinkerton and installed in the said Continental Seal Beach lease in late 1932 or early 1933, and insofar as the claims of the Blanchard '395 patent are concerned, said devices are identical. Both the 1932-33 devices and the accused devices included in a safety apparatus for boilers, the combination of a fuel supply conduit, a valve in said conduit, means for yielding holding said valve open, a cylinder, a piston responsive to pressure in said cylinder arranged to close said valve, means for supplying fluid under pressure to said cylinder to force said fluid against the piston, and a manually operable valve to relieve the fluid pressure in said cylinder, said piston having a body of liquid thereon as a result of condensation of the steam in the inlet line. Neither of said devices employed or employs a check valve or any other device, structure or means which can respond to or be considered the equivalent of the "non-return means" recited in Claims 2 and 3 of said '395 patent.

XII.

None of the claims of the '395 patent are or have been infringed by any device or apparatus made, used or sold

by the defendants or either of them prior to the filing of the Complaint herein.

XIII.

Each of the claims in suit calls for and is limited to a single cross-pin operating a plurality of alligned needle valves, each with a slot in its valve stem, the slots being of different size and the valves being operated by a float lever. Each of the claims must be strictly limited to the precise structure illustrated in the patent, and as so limited is valid.

XVII.

The accused devices of defendants do not have slots of different sizes in their valves, nor do they have a single pin extending through slots in the valves or their valve stems. The defendants' structure uses separate pins located at two different places to operate two separate valves in a manner different from that disclosed or claimed in said '611 patent.

XVIII.

The combination of the loose ring 52 pivotally connected to the valve shown in Exhibit D is not the equivalent of a valve stem and slot as shown or claimed by the '611 patent, nor is it the equivalent of such a valve and slot in two parts. The separate pin of the accused structures are not the equivalent of the cross-pins shown or claimed in the '611 patent. Said pins of defendants do not comprise and may not be considered to be the equivalent of a single pin in two parts.

XIX.

The means employed in the accused devices for achieving sequential operation of the valves therein are entirely dissimilar from those shown in the '611 patent, and consequently none of the '611 claims are or have been infringed by any devices made, used or sold by the defend-

ants or either of them prior to the filing of the Complaint herein.

XX.

The accused devices are merely normal variations of the Reliance valve and the early Pinkerton structure open to any member of the general public.

CONCLUSIONS OF LAW

2.

None of the claims of either of said patents in suit is infringed by any structure or device made, used or sold by defendants or either of them prior to the filing of the Complaint herein.

3.

The complaint should be dismissed.

4.

Defendants should be allowed their costs and disbursements herein.

Pursuant to subdivision 6 of Rule 19 of Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit, the appellant herein hereby designates the following parts of the record which he thinks are necessary for the consideration of the above points and which should be printed by the Clerk, namely:

* * * * *

Respectfully submitted,

HAMER H. JAMIESON

Attorney for Appellant

Address: Security Building Los Angeles 13,
California

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND ORDER CORRECTING
RECORD

It is hereby stipulated by and between the above parties through their respective counsel that the following corrections be made in the Reporter's Transcript of the testimony taken at the trial of this case:

Page 106, lines 18, 21 and 24, change "piston" to—
Pinkerton—

Page 167, line 5, change "1933" first occurrence to—
1932—, and change "late" second occurrence to—early—

Page 172, line 25, change "1942" to—1932—

Page 176, line 10, change "heater" to—meter—

Page 258, line 17, change "radio" to—radial—

Page 268, line 11, change "table" to—cable—

Page 279, line 21, after "since" insert —, until—

and that the Clerk be authorized to make said corrections in the record on appeal before sending it to the printer.

Dated at Los Angeles, California, this 9th day of
August, 1948.

HAMER H. JAMIESON

Attorney for Appellant

FULWIDER & MATTINGLY

By Robert W. Fulwider

Attorneys for appellees

Approved and so ordered this 13th day of August,
1948.

WILLIAM DENMAN

United States Circuit Judge

[Endorsed]: Filed Aug. 13, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

AMENDMENT TO DESIGNATION

The appellees above-named hereby amend their designation of the record to be printed as follows:

By deleting French patent No. 375,308 from Exhibit I.

This amendment is made to obviate the necessity of a translation of said patent since it is not necessary to a consideration of the appeal. The patent was cited as a file wrapper reference, but was not relied upon by the Patent Office.

Dated at Los Angeles, California, this 30th day of September, 1948.

FULWIDER & MATTINGLY

By.....

Attorneys for Appellees.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 4, 1948. Paul P. O'Brien,
Clerk.

~~ORIGINAL~~
No. 11,991.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALVA G. BLANCHARD,

Appellant,

vs.

J. L. PINKERTON, INC., a corporation, and J. L. PINKERTON,

Appellees.

APPELLANT'S OPENING BRIEF.

HAMER H. JAMIESON,

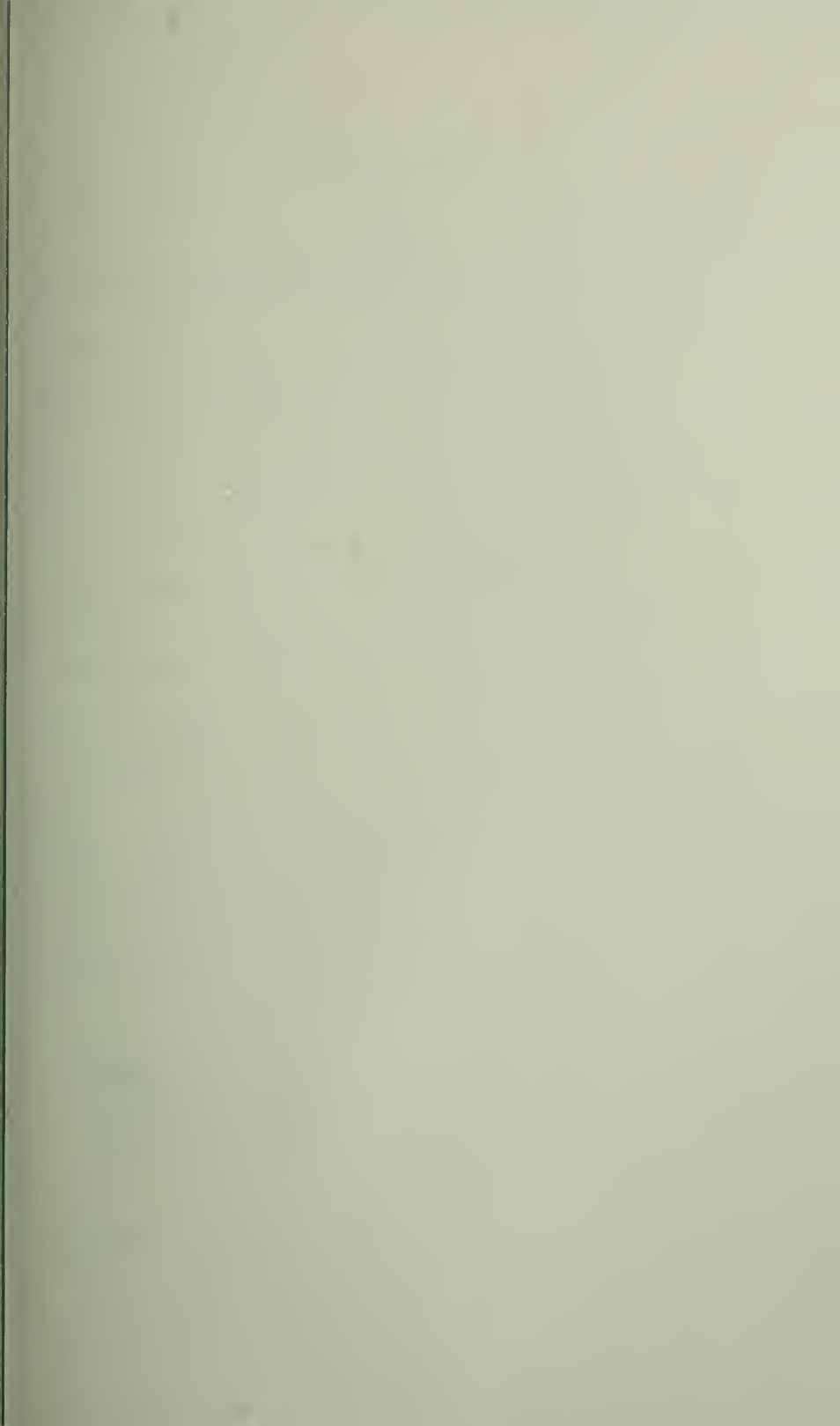
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FILED

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Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL PLEADINGS AND FACTS.

Jurisdiction of the District Court in this case is shown by the Complaint [R. p. 2], which alleges infringement of two United States Patents, under 28 U. S. C. A. 41.

Jurisdiction of this court is shown by the Notice of Appeal [R. p. 28], which was filed within thirty (30) days after the Judgment was entered, under 28 U. S. C. A. 225.

STATEMENT OF THE CASE.

This is a patent infringement suit brought for infringement of two United States Letters Patent, numbered 2,199,611 and 2,233,395, the former being a division of the latter, which was filed in the Patent Office on October 14, 1935.

The lower court held the patents valid and found title to both of the patents in suit in the plaintiff-appellant, defendants-appellees did not cross-appeal and so validity of the patents in suit has been finally adjudicated on the merits.

However the lower court refused to hold the patents in suit infringed, and therefore appellant has prosecuted this appeal.

The principal difference between the views of appellant and of the court below is that appellant believes that the patents in suit cover valuable steps forward in the art and that as such they are entitled to the liberal construction always accorded such patents by our courts.

The court below fell into error by failing to perceive this and by erroneously trying to limit the claims in issue sufficiently to evade infringement.

The appellant submits:

1. That he is entitled to a sufficiently liberal interpretation of the claims in issue to include the appellees' accused devices.

2. That the appellees' accused devices are such slavish "Chinese copies" of the appellant's patented inventions that no justifiable limitation of any of the claims in issue of the patents in suit will avoid the deliberate infringement present in the appellees' accused devices in this case.

The clear error present in the judgment of the lower court in this case will be made apparent by an understanding of the inventions in suit and by a separate comparison of each of the claims in issue with the appellees' accused devices and with the prior art.

SPECIFICATION OF ERRORS.

The specification of errors relied upon is as follows:

That the United States District Court for the Southern District of California, Central Division, erred:

1. In failing to find that claims 1, 2 and 5 of patent in suit No. 2,199,611 are infringed, as is shown fully hereinafter.

2. In failing to find that claim 1 of patent in suit No. 2,233,395 is infringed, as is shown fully hereinafter.

3. In failing to order, adjudge and decree an injunction upon Letters Patent No. 2,199,611, particularly claims 1, 2 and 5 thereof, because they are being infringed.

4. In failing to order, adjudge and decree an injunction upon Letters Patent No. 2,233,395, particularly claim 1 thereof, because it is being infringed.

5. In failing to order, adjudge and decree that plaintiff is entitled to costs, and an accounting, because the patents in suit have been infringed and appellant has been damaged.

6. In making the following Findings of Fact set forth in detail at pages 306 to 310 of the Record on this appeal, and incorporated herein by reference, to-wit: II, III, IV, V, VI, X, XI, XII, XIII, XVII, XVIII, XIX and XX, because they are contrary to the evidence herein.

7. In making the following Conclusions of Law set forth in detail at page 310 of the Record on this appeal, and incorporated herein by reference, to-wit: 2, 3 and 4, because they are contrary to all of the evidence herein, and the law applying thereto.

ARGUMENT.

It is appellant's contention:

(1) That the inventions of the patents in suit constitute steps forward in their art, and that, as such, they are entitled to a liberal interpretation of the claims in issue herein.

(2) That the validity of the patents in suit has been finally held by the court below and is not open to attack in this appeal.

(3) That Claims 1, 2, and 5 of Patent in Suit No. 2,199,611 are infringed by the appellees' accused structures like appellant's Exhibit 12, shown in appellant's Exhibit 10.

(4) That Claim 1 of Patent in Suit No. 2,233,395 is infringed by the appellees' accused structures shown in appellant's Exhibits 8 and 9, and illustrated in appellant's Exhibit 11.

POINT (1)

The inventions of the patents in suit constitute steps forward in their art, and rapidly supplanted the prior art structures and therefore they are entitled to a liberal interpretation of the claims in issue herein.

The Invention in Suit.

The inventions of the patents in suit, one of which is a division of the other, concern valve operating structures and safety apparatus for boilers, such as those used in oil fields for generating the steam necessary to drill an oil well.

At the time that the inventions of the patents in suit were made many of these boilers were blowing up in the oil fields, causing great losses of life and property. Exhibits 6, 6a, 7, 7a and 7b show the remains of boilers which have gone through such explosions.

The invention and use of the inventions of the patent in suit virtually completely eliminated these explosions.

The invention of the patent in suit thus constituted a distinct step forward in the art.

In order to understand why the invention of the patent in suit constituted a distinct step forward in the art it is necessary to understand the causes of these boiler explosions before the invention of the patents in suit, the safety equipment in existence at that time, and the means by which the invention of the patents in suit accomplished this forward step of stopping those frightful and then-prevalent boiler explosions.

These boilers consisted of an outer shell, an inner shell of substantially similar but smaller configuration and suitable fuel fed burners. The burners directed their heat against the under surface of the inner shell, the top of which is called a "crown sheet." Between the two shells water was fed to a desired height. The effect of the heat from the burners directed on the crown sheet below the water is to heat the water and turn some of it into steam. This steam fills the space above the water between the inner and outer shells. This steam is then fed by suitable piping to the oil well drilling rig where it is used to drill the well. More water is fed to the boiler as the water is turned into steam and used.

Sometimes, through neglect or failure of some of the "feed water" mechanism, the level of the water fell until there was little or no water on top of the crown sheet. This often led to very serious boiler explosions, of two types.

The first type, a vertical explosion, was caused when all of the water on top of the crown sheet was turned into steam, leaving the crown sheet uncooled by surrounding water. In such cases the heat of the crown sheet often

became so excessive that it caused the crown sheet to buckle and fall in, resulting in the first type of explosion, usually in a vertical direction. Remains of such explosions are pictured in Exhibits 6 and 6-A.

The second type of boiler explosion, usually in a horizontal as well as a vertical direction, remains of which are pictured in Exhibits 7, 7-A and 7-B, is caused by the fireman adding water when the level of the water is so low and the heat of the crown sheet is so great that the water turns into steam faster than the safety valves can take care of it. This causes a sudden rush of steam in the boiler which then explodes in all directions, frequently causing loss of life or injury to personnel.

At the time that appellee invented the inventions of the patents in suit he was in constant touch with the oil fields and the equipment available therein because he was manufacturing and selling alarms which warned the operator when the water got dangerously low. These were called "low water alarms."

Appellee testified [R. p. 38], and the whole record herein shows, that when he invented the inventions of the patents in suit these low water alarms were the only safety apparatus in existence in the oil fields to guard against these explosions which were taking a fearful toll of lives and property.

The fatal defect in these "low water alarms" that simply sounded a warning when the water level fell to a certain point was that when the alarm sounded the boiler attendant was frequently busily engaged somewhere else and he would keep on with the job he was working on, intending to take care of the cause of the low water alarm's sounding "in a few moments." The trouble was he waited too long and the boiler blew up [R. p. 39].

Appellee saw that what was needed was a mechanism

that would make the boiler attendant drop whatever he was doing when the alarm sounded and go at once to rectify the situation.

The possibility of an explosion seemed too remote. The fact that these explosions occurred frequently proved that the danger of a possible explosion was not a sufficient incentive to make the attendant drop what he was doing and take care of the water supply in the boiler.

Though these explosions occurred "frequently" over the industry as a whole, they occurred "infrequently" on an individual lease, so there were plenty of boiler attendants who never saw a boiler explosion. This is why these boiler attendants regarded the danger of an explosion so lightly.

Appellee solved this problem by his invention of the patents in suit. The way that appellee solved this problem was to provide a mechanism which automatically shut off the supply of fuel to the boilers AFTER a lapse of time following the sounding of the whistle alarm. The amount of this lapse of time could be adjusted and predetermined because the fuel shut off mechanism was actuated after the water level in the boiler fell a predetermined distance below the point where the alarm whistle was sounded.

The effect of this on the boiler attendant was magical. He knew that if he didn't repair the feed water system promptly after the alarm whistle started blowing the fuel line would be shut off. This would cause the steam to go down and the drilling operations would be stopped. At once the driller, who was the boiler attendant's boss, would leave the rig and come back to the boilers to find out why the attendant had let the steam pressure go down.

Human nature is such that the boiler attendants were more afraid of incurring the wrath of their boss than

they were of a possible (to them highly remote) explosion. Hence, they jumped to fix the feed water system after the alarm started blowing when the invention of the patents in suit was installed on their rigs.

The testimony shows that these boiler explosions stopped when the invention of the patents in suit was made and one of them was installed on a rig.

It seems a simple matter—one that anyone could have thought of. But the fact is that no one thought of it until the appellant invented it. Such is the situation quite often in the case of inventions of the greatest merit. No one could solve the problem before the inventor, but AFTER he solved it by making the invention, everyone is ready to say how simple, how obvious it is—that is everyone except our courts which have steadily upheld the rights of inventors of valuable inventions that were so simple that everyone, especially the infringing defendants, said how obvious it was AFTER the invention was made.

This Court did it quite recently in a decision rendered on June 15, 1948, *Bianchi v. Barili*, 78 U. S. P. Q. 5, in which this Court quoted *Loom Co. v. Higgins*, 105 U. S. 580, 591-592, at page 9 of 78 U. S. P. Q. as follows:

“‘Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit.’” (Emphasis ours.)

Other law that was disregarded by the Lower Court is as follows:

The Law That Was Disregarded by the Lower Court.

In *Los Angeles Art Organ Co. v. Aeolian Co.*, 143 Fed. 880 (C. C. A. 9), this Court said at page 883:

“Their invention was therefore more than a mere improvement of what had preceded it.

It was of such novelty and importance as to constitute a DISTINCT STEP in the progress of the art, and the claims of their patent are therefore entitled to a broad and LIBERAL CONSTRUCTION. Morley S. M. Co. v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 299, 32 L. Ed. 715 and authorities there cited; Letson v. Alaska Packers Ass'n, 130 Fed. 129, 140, 64 C. C. A. 463; Brown Bag Filling M. Co. v. Drohan (C. C.), 140 Fed. 97." (Italics and capitals ours.)

This Court expressed similar views in *Von Schmidt v. Bowers*, 80 Fed. 121 (C. C. A. 9), at page 147 and in *Bianchi v. Barili*, 78 U. S. P. Q. 5 at page 6.

The rule thus enunciated by this Court may be summarized this way:

The claims of a patent for a meritorious invention which substantially advances the art should be given a liberal construction so as not to permit a defendant to escape who reaches the same result by analogous means even though there are superficial dissimilarities in the construction of the plaintiff's and defendant's devices.

If this Court will apply this test to the claims in issue and the appellee's accused devices in this case there can be only one decision.

It was the Lower Court's refusal to apply this Court's above well known rule of law to the facts in this case that caused it to fall into error and made necessary this appeal.

Perhaps the reason that the Lower Court fell into this error is found in the part of its "Memorandum Decision" that is printed on page 12 of the Record on this appeal.

There the Lower Court made the unique error of assuming that because the specification of a patent in suit herein used the word "improvements" it meant that the patent was a secondary patent and could not be a primary patent, or even constitute a substantial advance in the art.

This ruling of the Lower Court is a pure mistake of law and misunderstanding of patent practice. Practically all patents use the word "improvements" and its presence or absence is never intended by the patentee, his patent attorney or the Patent Office to indicate whether the patent is secondary or primary.

The prior art patents cited by the appellees in this case, for instance, no matter how old they are, use this word "improvement," as this Court can see by examining them.

Hence it was error for the Lower Court to base its conclusion of non-infringement upon the presence of the word "improvements" in the specifications of the patents in suit.

Obviously if the presence or absence of the word "improvement" in the introductory part of the specifications was the determining factor in testing whether the patent was secondary or primary, as the Lower Court holds at page 12 of the Record in this case, *no one would ever use the word "improvements"* lest it limit the scope of their claims.

Rather the word "improvements" infers the presence of "invention" in the device.

If this Court will read pages 12 and 13 of the Record in this case with this point in mind, it will see how the Lower Court fell into this error.

Finally it must be borne in mind that this invention of the patent in suit *rapidly supplanted the prior structures*, namely the whistle alarms alone [R. pp. 38-41, incl.; 289], and this fact also entitles it to a *liberal construction*.

Wensel v. Goldhill Hardware Mfg. Co., 21 F. 2d 974 at p. 976.

Section Summary.

Appellant has shown that he is entitled to a *liberal construction* of the patents in suit, first because the patented inventions constitute a substantial step in the art, and second because they rapidly displaced the prior devices.

Appellant will now briefly describe the patents in suit which cover the means by which he accomplished his distinct step which is *not found* in the prior art.

The Means by Which the Inventions in Suit Accomplished Their Substantial Advance in the Art, Namely, Stopping Those Boiler Explosions.

The means by which appellee achieved the substantial advance in the art described above are very simple.

PATENT No. 2,199,611.

The first patent in suit, No. 2,199,611, describes and claims a valve mechanism which can be used as one of the elements of the combination described and claimed in the second patent in suit (No. 2,233,395) by which appellant accomplished the distinct forward step of consecutive actuation of a fuel shut off valve after a lapse of time after an alarm valve has been actuated.

PATENT No. 2,233,395.

The second patent in suit, No. 2,233,395, describes and claims the combination of mechanism by which appellant accomplished the distinct forward step of automatically shutting off the fuel supply valve after the water level in the boiler had fallen a predetermined amount below the point where the alarm whistle was sounded, and hence after a lapse of time.

These mechanisms, as shown in the drawings, described in the specifications and claimed in the claims in issue of the patents in suit herein are fully described in detail hereinafter at the point where infringement is shown.

POINT (2).

Validity Not in Issue.

The validity of the patents in suit has been finally held by the Court below and it is not open to attack in this appeal.

It is not open to defendants-appellees to attack or question the judgment of the Court below finding the patents in suit valid because defendants-appellees did not file a cross-appeal.

An appellee not having appealed from a decree awarding him affirmative relief *cannot review* the denial of a portion of the relief which he sought. *Tjosevig et al. v. Donohoe et al.* (C. C. A. 9) 262 Fed. 911, 918; *Gay et al. v. Focke* (C. C. A. 9) 291 F. 721, 727; *Sanborn Cutting Co. v. Paine* (C. C. A. 9) 244 F. 672, 681.

He may not, in the absence of a cross-appeal, attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. The rule is inveterate and certain. (*Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 57 S. Ct. 325, 81 L. Ed. 593. See also *Stepp v. McAdams etc.* (C. C. A. 9) 83 F. (2d) 925; *The Maria Martin*, 79 U. S. 31, 40, 20 L. Ed. 251, 252; *Union Tool Co. v. Wilson*, 259 U. S. 107, 111, 66 L. Ed. 848, 851, 42 S. Ct. 427).

An appellee may not attack a judgment even on grounds asserted in the Court below, in an effort to have the Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him.—O'Brien's "Manual of Federal Appellate Procedure," Third Edition, pages 54-55.

Therefore, the validity of the patents in suit may not be questioned or even argued on any ground whatsoever by appellees in this Court on this appeal.

Furthermore the presumption of validity created by the issuance of the patents in suit is greatly strengthened and increased by the fact that the District Court sustained the validity of the patents in suit herein. In *Bianchi v. Barili*, 78 U. S. P. Q. 5, this Court said at page 6:

“Particularly heavy is the attacker’s burden when the validity of the patent has been sustained by court findings.” (Citing cases.)

Preliminary Summary.

Since the claims in issue of the patents in suit have been thus held valid, appellant will conclude this Opening Brief by considering the claims in issue herein, showing their clear embodiment in the appellees’ accused devices, the remoteness of the prior art cited by appellees in the court below, and the impossibility of that art limiting any of the claims in issue herein.

They will show that the valid claims in issue herein are

- (1) Obviously infringed, and
- (2) Not limited by the prior art.

In analyzing the following pages of this brief this Honorable Court is earnestly urged to keep in mind the *liberal construction* to which the patents in suit are entitled under the authorities cited in the first section of this brief because of *the substantial advance* made in the art by the invention of the patents in suit herein.

POINT (3).

Claims 1, 2 and 5 of patent in suit No. 2,199,611 are infringed by the appellees' accused structures like Exhibit 12, shown in Exhibit 10.

Claim 1.

The following elements of Claim 1 of patent in suit No. 2,199,611 are clearly shown in the drawings and described in the specifications, they were shown at the trial to be equally clearly present in appellees' accused structure [R. pp. 62-66] and appellees will not deny, and therefore they will admit that they are embodied in their accused devices:

- (a) "*A housing*" [see patent in suit No. 2,199,611, spec. p. 1, col. 1, lines 46-48 and R. p. 62 to 64].
- (b) "*A plurality of outlet passages through said housing*" [see spec. p. 1, col. 1, lines 52, to col. 2, line 3, and R. p. 64].
- (c) "*A valve in each of said passages*" [see spec. p. 1, col. 2, lines 7 to 11, and R. p. 64].
- (f) "*Operated by a lever fulcrumed within said housing*" [see spec. p. 1, col. 2, lines 30 to 35, and R. p. 65].
- (g) "*A float on the end of said lever*" [see spec. p. 2, col. 1, lines 4 to 6, and R. p. 65].
- (h) "*Whereby said valves are opened one at a time in sequence, responsive to the downward movement of said float*" [see spec. p. 2, col. 1, lines 7 to 17, and R. pp. 65 to 66].

The only elements of claim 1 of patent No. 2,199,611 that appellees will contest are elements (d) and (e). Appellant will therefore now show that these elements are also clearly embodied in appellees' accused structures.

In considering these elements (d) and (e) this Court should remember that the file wrapper of this patent in suit No. 2,199,611, Exhibit "K" herein, shows that appellant was not forced to insert these limitations (d) and (e) by the prior art or by the Patent Office, and, for this reason also, a *liberal construction* should be accorded these elements and these claims.

(d) "SAID VALVES HAVING SLOTS OF VARYING LENGTHS IN ONE END TO DETERMINE THE ORDER IN WHICH THEY ARE OPENED."

This element of Claim 1 of this patent in suit is described in the specification of this patent in suit at page 1, column 2, lines 11 to 29.

Turning to the appellees' structure shown on the right hand side of Exhibit 10, it is seen that the accused structure embodies this element of claim 1 in letter and in spirit. Applying the aforesaid description from page 2, column 2, lines 11 to 29 of the specification of this patent in suit in quotes herebelow, to the appellees' accused structure, it is seen that:

"Each valve, 15 and 16, has a rearwardly extending valve stem." The rearwardly extending valve stem of valve 15 is marked 17 in Figure 2 and the rearwardly extending valve stem of valve 16 is made in two pieces, suitably joined together, instead of in one piece. (This will be discussed more fully hereinafter.) There is "an opening in each rearwardly extending valve stem to receive a crosspin" marked 25 in Figure 2 (instead of 18, the number used in this patent in suit). This crosspin is likewise made in two pieces instead of one (which will be discussed more fully hereinafter) and the crosspin 25 is "mounted on the valve operating lever 20."

"In order that the valves 15 and 16 may be operated in a predetermined sequence the openings through which

the crosspin 25 passes are of different lengths in the different valve stems." The appellees have made "the stem of the valve 15 as providing a close fit about the pin 25. In the stem of the valve 16, however, the opening is elongated, as shown at 21 [in Figure 1 of Exhibit 10]. It will be noted that there are only two valves in the appellees' accused structure instead of three.

"It will be obvious from this construction that when the lever 20 is operated to move the valves, the valve 15 will be moved first and at a predetermined interval thereafter the valve 16 will be opened." It is noted that the valve 15 opens the passageway to the steam pipe 11 which communicates with the whistle and the valve 16, which is opened a predetermined period afterward, communicates with the steam pipe 12 which in turn leads to the fuel shut-off valve and closes it when the steam passes through that passageway 12.

It is obvious that the appellees' structure has all of the above characteristic features of this element of claim 1 that are described in the specification of this patent in suit.

The only differences between the appellees' structure and the structure shown in the drawings in the patent in suit are that two of the parts, namely the valve stem of valve 16 and the pin 25, are each made in two parts instead of one.

Functionally the appellees' and appellant's structures operate exactly the same. The reason that appellees made these parts in two pieces instead of one was to attempt to evade infringement of this patent in suit, or to put it colloquially, to try to get around the patent.

It is because of this evasion by the appellees that appellant has quoted and cited the law hereinabove on the liberal construction to be accorded the claims of the patents

in suit because the inventions of the patents in suit represent substantial advances in the art.

At this point it is well for the Court to keep in mind and consider the authorities cited hereinabove to that effect.

Not only are those authorities controlling to find infringement at this point, but also there are specific authorities that a defendant cannot evade the consequences of his infringing act by making a part in two or more pieces if that part performs the same work in substantially the same way as a single part did in the structure shown in the patent in suit.

Some of the leading authorities which hold that a defendant who makes an element in two or more parts instead of one will not evade or avoid infringement by so doing are these:

Multiplication of Parts.

Infringement is not averted by the separation of one integral part into two, the two parts doing substantially what was done by the single part.

This principle is thoroughly established. It was well stated by this Court in:

King County Raisin & Fruit Co., et al. v. United States Consol. Seeded Raisin Co., 182 Fed. 59 (C. C. A. 9), at page 63:

"Infringement is not avoided by the fact that one of the integral elements of his built-up impaling roll is by the appellants separated into two or more distinct parts, so long as the function and operation remain substantially the same. Kalamazoo Ry. Supply Co. v. Duff Mfg. Co., 113 Fed. 264, 51 C. C. A. 221; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375; H. F. Brammer Mfg. Co. v. Witte Hardware Co., 159 Fed. 726, 86 C. C. A. 202." (Emphasis ours.)

See also:

Walker on Patents, Deller's Edition, Section 462
at pages 1698-1699;

Nathan v. Howard, 143 Fed. 889 (C. C. A. 6), at
page 893;

Western Tube Co. v. Raine, 156 Fed. 49 at page
56;

Line Material Co. v. Brady Electric Mfg. Co., 7
F. 2d 48 (C. C. A. 2), at pages 50 to 51;

Arthur Colton Co. v. McKesson & Robbins, Inc.,
58 F. 2d 157 at page 158;

Skelton et al. v. Baldwin Tool Works, 58 F. 2d
(C. C. A. 4), 221 at page 227.

That the appellees' structure operates in substantially the same way to produce substantially the same result and therefore it infringes this element of claim 1 was clearly and unequivocally shown at the trial and by the exhibits. The slot 21 of Figures 1 and 2 in Exhibit 10 works just the same as the slot 22 in Figure 2 of the patent in suit. This result is to accomplish a delayed action and to move the valve 16 off of its seat after the level of the water has receded a certain amount. Of course, adjustment of the amount of this recession before the fuel shut-off valve is operated is effected by varying the length of the slot. Certainly the length of the slot 21 in the appellees' structure in the right hand side of Exhibit 10 varies from the sliding fit slot in valve 15 in Exhibit 10 in the same identical manner that slot 22 of valve 14 in Figure 2 of the patent in suit varies from the loose sliding fit of the slot in valve 16 of the patent in suit. The purpose of this variation in length of slot is to allow a period of recession of the water between the place that the first control valve [15 in Figure 2, Exhibit 10, appellees' structure and 16 in Figure 2 of the patent in suit], is pulled off its seat and the place where the fuel control valve operating unit valve

[16 in Figure 2 of the appellees' structure in Exhibit 10 and 14 in Figure 2 of the patent in suit], is pulled off its seat, thus actuating the mechanism that closes the fuel shut-off valve.

Appellee Pinkerton, clearly and unequivocally admitted infringement of this element at pages 283-285 of the Record on this appeal as follows:

"Q. If the second valve is hooked up to the fuel shut-off in your device, the lowering of the arm past the point where the first valve is opened to the point where second valve is opened will not perform any additional function or work than *closing* the fuel shut-off valve, will it? . . . A. Yes, it will close it. . . .

Q. It will close it? A. Yes.

Q. *It doesn't do anything else besides close it?*

A. *That is all.*

Q. So that the work that the second valve in your structure, Exhibit 12, does, and the work that the second valve in the Blanchard structure, Exhibit 5, does, is exactly the same, isn't it? A. I would say the job was the same, yes. . . .

Q. By Mr. Jamieson: *The result is exactly the same?* A. *Yes.*

Q. *And the way that that result is accomplished is the same in both valves, isn't it?* A. *Yes.*" [R. pp. 283 to 284.] (Emphasis ours.)

"Q. *Between the valve seat and the pin in Blanchard's, there is just one piece or member, isn't there?*

A. There is just one valve.

Q. One piece of mechanism? A. *Yes.*

Q. *And between the valve seat and the pin in your device there are two pieces of mechanism, aren't there, whatever you call them, there are two pieces of mechanism, aren't there?* A. *Yes.*

Q. *The one piece of mechanism in Blanchard's and the two pieces of mechanism in yours perform the same identical work, don't they? . . . A. Yes, they open the valve.*" [R. pp. 284 to 285.] (Emphasis ours.)

Obviously this element of claim 1 of this patent in suit is clearly embodied in the appellees' accused structure. Appellees should not be permitted to escape the consequences of their clear infringement by the fictitious argument that they have made two of the parts, namely, the extension of valve 16 and the pin 25 in two parts instead of one, calling the second part a "lever," particularly when the appellee Pinkerton himself admits in the above excerpts that they do "the same identical work," that "the result is exactly the same," and that "the way that that result is accomplished is the same in both valves;" and when the Court can see by manipulating the valves themselves that they do that "same identical work" in substantially the same manner.

When the Lower Court erroneously decided this issue in favor of the appellees and precipitated this appeal, it committed a gross abuse of discretion and violated the law, both the law of the *liberal construction* to be accorded the patent in suit, as quoted earlier in this brief, and the law that it does not evade infringement to make a part in two parts instead of one.

To right this wrong appellant brought this appeal and appellant feels certain that this Court will not permit these appellees to purloin this valuable invention by the illegal subterfuge of making some of the parts in two pieces instead of one, and calling the second part by another name.

(e) "A PIN THROUGH SAID SLOTS."

This pin is described in the part of the specification quoted in the preceding element of this claim and is numbered 18 in the patent in suit.

The essence or mental concept of this element of claim 1 is a member which is rigidly attached to the lever 20 so that it can function integrally as a part of the lever 20 (the next element of this claim specifies that this element is "*Operated by a lever*" 20) to contact the rear end of an opening in another member connected to the valves in order to pull the valves off of their seats.

Applying this concept to the appellees' accused structure, Exhibit 10, it is seen that the pin 25 is made in two pieces and that it is attached to, or mounted on the lever 20. One piece is mounted on the end of the lever 20 at 25 in a yoke like the yoke 19 shown in Figure 2 of this patent in suit. The other piece of this pin 25 is mounted close to the first piece at another point on the lever 20.

The function of these two pieces is to contact the inner ends of the valve slots consecutively and pull the appellees' valves off their seats in sequence.

The piece of pin 25 mounted in the yoke will contact the inner end of the slot on the extending valve stem 17 of valve 15 and will pull valve 15 off of its seat 13 when the float 33 and the arm 20 fall beyond the point where it is desired to start the alarm whistle blowing continuously.

At a predetermined interval thereafter, depending upon the length of the slot 21 in appellees' accused structure, the other piece of pin 25 will contact the inner end of slot 21, which is connected to valve 16 as an extension of valve 16's valve stem which is made in two pieces instead of one. This contact of pin 25 with the inner end of slot 21 will cause appellees' valve 16, which may be connected to

a fuel shut-off valve, to be pulled off of its seat 13 when the float 33 and its connected arm 20 falls beyond the point where pin 25 has contacted the inner end of slot 21. This mode of operation is substantially the same as the mode of operation of the analogous mechanism in the drawings of this patent in suit.

This is another and final illustration of the appellees' attempts to evade their clear infringement of this patent by making parts or elements in two pieces instead of one. The authorities on the *liberal construction* to be accorded because of the *substantial advance* in the art, cited hereinabove, and also the specific authorities that a defendant will not be permitted to evade his infringement by making a part or element in two pieces instead of one, will control this element of this claim of this patent in suit in the same manner that these authorities control the preceding element of this claim which was covered fully hereinabove.

On cross-examination the appellee Pinkerton also admitted that the two-piece pin in his accused device gets the same result as the one-piece pin in Blanchard. [R. p. 286.]

Appellee Pinkerton also admitted that the two-piece pin and the two-piece valve stem in his structure did the same work and the same job in the same way as the one-piece pin and valve stem in Blanchard as follows:

"Q. So that *the work of the second valve in your structure, Exhibit 12, does, and the work that the second valve in the Blanchard structure, Exhibit 5, does, is exactly the same, isn't it?* A. *I would say the job was the same, yes.*

Q. And the job is to shut that fuel shut-off valve?

A. If you are hooked to a fuel valve, yes. . . .

Q. *The result is exactly the same?* A. *Yes.*

Q. *And the way that that result is accomplished is the same in both valves, isn't it?* A. *Yes.*" [R. pp. 283 to 284.] (Emphasis ours.)

Therefore, the two pieces of the appellees' pin and the two pieces of the appellees' valve stem operate in "substantially the same way" and accomplish "substantially the same result" as the one-piece pin and one-piece valve stem in the patent in suit, and, under the law cited fully hereinabove, this is infringement.

Also this Court under similar circumstances recently held that such a change would not avert infringement.

Bianchi v. Barili, 78 U. S. P. A. 5, at page 10:

"The mere transfer of the axial cutters from the roller containing the molds to the other roller, containing the annular peripheral cutters, does not avert infringement. The means and the function of cutting in the two machines are identical. Exactly opposite to this sort of transposition is the language found in 3 Walker, Sec. 463, page 1699:

"'Changing the relative positions or reversal of the parts of a machine or manufacture does not avert infringement, where the parts transposed perform the same respective functions after the change as before.'

"Bianchi himself testified that the position of the cutters was immaterial." (Emphasis ours.)

For all of the above reasons appellant submits that this element of Claim 1 of this patent in suit is embodied in appellee's accused structure and that it operates in substantially the same manner and accomplishes substantially the same result. Therefore, infringement of this element of Claim 1 of this patent in suit No. 2,199,611 has been fully shown.

This Court stated the true rule in finding infringement in *Bianchi v. Barili*, *supra*, at page 11 of 78 U. S. P. Q.:

“A leading text-writer on the law of patents has pointed out that infringement is a question of fact. 3 Walker Sec. 450, page 1680.

“It is also a question of substance, and not of nomenclature. *It is not to be settled by striving to ascertain the difference between tweedledum and tweedledee.*

“In *Hydraulic Press Mfg. Co. v. Williams, White & Co.* (C. C. A. 7), 165 F. 2d 489, 492 (76 U. S. P. Q. 559, 562), the court said:

“*In determining the question of infringement, the court is not to judge about similarities or differences by the names of things, but is to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it.* (Case cited * * * One does not escape infringement by providing a single element which fully responds to a plurality of elements in the patent. (Case cited.)’

“So here, Bianchi did not escape infringement by putting all his cutters on one roller, for he thereby was ‘providing a single element which fully responds to a plurality of elements (*i. e.* two cutting rollers) in the patent.’

“Nor need the substantial identity between the two machines be demonstrated to a mathematical certainty. In *City of Grafton, W. V. v. Otis Elevator Co.* (C. C. A. 4), 166 F. 2d, 816, 821 (76 USPQ 450, 453), the following language was used:

“‘Rarely do we find an example of what might be called perfect infringement. *No patent infringer would be so silly as to make and vend a device similar in every minute detail to a patent.* Infringement

connotes between the patent and the accused device, merely correspondence as to the substantial, dominant and essential elements. *Any other view would make of a patent a foolish and fatuous thing.*” (Emphasis ours.)

It is perhaps inconceivable that any court would decide directly contrary to that vast weight of authority that making a device in two parts instead of one will evade infringement, but that is exactly what the Court below did in its appealed “Memorandum Decision” in this case, as follows:

“It is evident that the claims call for a *single* pin

. . .

“The accused devices do *not* have a *single* pin

. . .

“Pinkerton . . . uses *two separate* pins . . .

“So, admitting that the result is the same, the means by which it is achieved are so dissimilar from those of the patent in suit as to prevent . . . a finding of infringement.” [R. p. 17.]

This obviously erroneous legal conclusion is repeated in the “Findings of Fact” (No. 18) appealed from herein, as follows:

“The separate pins of the accused structures are not the equivalent of the cross-pin shown or claimed in the 2,199,611 patent” [R. p. 24].

This Honorable Court can right this wrong that has been done to appellant by following the well established rule that it does not avoid infringement to make a part in two or more pieces that do the same work in substantially the same way and reverse the erroneous ruling below with appropriate instructions to the Lower Court.

Summary.

It has been fully shown that the appellees' accused structure includes each of the elements of claim 1 of patent in suit No. 2,199,611.

Infringement of Claims 2 and 5.

The foregoing detailed analysis showing the clear infringement of claim 1 and explaining the meaning of the words and phrases in the claim will enable the Court to easily apply claims 2 and 5 of this patent in suit No. 2,199,611 to the appellees' accused structure, keeping in mind that each claim is separate and stands on its own feet, and that infringement of claims 2 and 5 was fully shown at the trial [R. pp. 67-72]. Appellant feels that due to the limitation of the length of this brief it will be more helpful to the Court to use the space that would be necessary to treat claims 2 and 5 of this patent as claim 1 was treated, by explaining and disposing of the prior art cited by the appellees.

It will be obvious when claims 2 and 5 of this patent in suit No. 2,199,611 are compared with the appellees' accused structure, shown in Exhibit 10, in the same manner that claim 1 was compared hereinabove [see R. pp. 67-72] that claims 2 and 5 of this patent in suit No. 2,199,611 are clearly and irrefutably embodied in appellees' accused structure and that therefore the appellees' accused structure is an infringement of claims 2 and 5 as well as of claim 1 of this patent in suit No. 2,199,611.

Appellant will now show that the prior art cited by appellees does not in any way limit the scope of the claims of this patent in suit No. 2,199,611 and that this prior art may be completely disregarded in considering the infringement of this patent in suit by appellees' accused structure.

The Art Prior to Patent No. 2,199,611.

In this case the appellees took the whole gist of the invention by copying it exactly except that two small parts were each made in two pieces instead of one, but the function performed by the two parts was identical with the function performed by the single parts in the embodiment shown in the drawings of the patent in suit and *any range of equivalents at all will cover these obvious evasions.*

No prior art device has the appellant's structure but with these parts made in two pieces—so this evasion is not founded on the prior art.

Also no new or added function is performed by appellees' two-piece constructions.

Appellee Pinkerton admitted all this flatly at the trial [R. pp. 282-285] as follows:

“Q. By Mr. Jamieson: *Does your valve do anything in addition to what Blanchard's does,* the first one? A. *No.*” [R. p. 282.] (Emphasis ours.)

“Q. If the second valve is hooked up to the fuel shut off in your device, the lowering of the arm past the point where the first valve is opened to the point where the second valve is opened will not perform any additional function or work than . . . *closing* . . . the fuel shut off valve will it? A. Yes, it will close it . . .

Q. *It doesn't do anything else besides close it?*
A. *That is all.*

Q. So that the work that the second valve in your structure, Exhibit 12, does, and the work that the second valve in the Blanchard structure, Exhibit 5,

does, is exactly the same isn't it? A. *I would say the job was the same, yes . . .*

Q. By Mr. Jamieson: *The result is exactly the same?* A. *Yes.*

Q. *And the way that that result is accomplished is the same in both valves, isn't it?* A. *Yes.*" [R. pp. 283-284.] (Emphasis ours.)

"Q. *The one piece of mechanism in Blanchard's and the two pieces of mechanism in yours perform the same identical work, don't they?* A. *Yes, they open the valve.*" [R. p. 285.] (Emphasis ours.)

With these principles in mind appellant will now review and dispose of the prior art cited by appellees in this case against this patent in suit, No. 2,199,611.

The Prior Art.

Validity of the patents in suit has been fully established.

First: The Patent Office found them valid and issued them.

Second: The Lower Court held them valid in this case, and

Third: The appellees did not appeal from the Lower Court's finding of validity.

Infringement of the *prima facie* reading of the claims in issue of this patent in suit has been clearly shown in the immediately preceding section of this brief.

It remains only to consider the appellees' prior art and show that it does not disturb this clear *prima facie* infringement.

Appellant has pointed out the authorities holding that if a *substantial advance* has been made in the art the patentee is entitled to a *liberal construction of his claims*.

A liberal construction is at least a prima facie construction and appellant has shown that a prima facie construction will find the appellees' accused structures to be infringements.

Therefore it is only necessary now to prove by a consideration of the prior art that the invention of this valid patent in suit is a sufficiently *substantial advance* in the art over appellees' prior art references to not disturb this clear *prima facie* infringement which was fully demonstrated hereinabove.

Appellant will show that the invention of this patent in suit is a *substantial advance* in the art by comparing it with the structures selected by the appellees below as their "best references." Then it will follow that, since the invention of this patent in suit is a *substantial advance* over appellees' "best references," it also is a *substantial advance* over appellees' remaining prior art, presumably their worst references.

I.

Appellees' "Best References."

At pages 212-212a of the transcript appellees in response to a query from the Lower Court, named Baldwin and Wright as their "best references" for this patent in suit.

Appellant will now consider those "best references" in that order and show that the invention of this patent in suit is a *substantial advance* over each of them.

(1) Baldwin, No. 716,982 Issued December 30, 1902.

This Baldwin device is neither designed nor intended to perform the function or do the work of this patent in suit and it cannot achieve the results that are accomplished by the patented combinations of claims 1, 2 and 5 of this patent in suit No. 2,199,611.

It is not necessary to repeat here the description of the complicated parts of this Baldwin patent which are fully explained in the patent itself. It suffices to point out the differences between Baldwin and this patent in suit and to show the substantial advance in the art achieved by this patent in suit over Baldwin.

Claims 1 and 2 of this patent in suit are limited to combinations and modes of operation upon "the downward movement" of the float or lever. Therefore this feature will be considered first.

In Baldwin *downward* movement of the float c will open only *one* valve, namely, needle valve c-22, which actuates a whistle G [R. p. 299].

Thus Baldwin is exactly like the old prior art whistle alarms that were common when appellant invented the patents in suit [R. p. 38].

If the water falls too low it blows a whistle, G, just like all the other whistle alarms.

There is no part or mechanism in Baldwin that is actuated or can be actuated after the whistle blows and the water falls still farther.

Also no other valve than C-22 can be actuated by the downward movement of float C in Baldwin.

Baldwin has two passages, C-23 and C-24, leading to passage g, which leads to whistle G, but these passages are only used at the extreme movements of the float c in *opposite directions*, as is shown by page 2, column 2, lines 126 to 133, inclusive, of the Baldwin specifications.

On the other hand the steam relief valve, C-3, is always operated at positions *within* these two extremes and *cannot* be actuated *outside* these extremes, or *after* the whistle valve is sounded.

Therefore this Baldwin device not only does not suggest or show the invention of the patents in suit, but Baldwin could not be used to do the work or perform the function of the patents in suit.

In short Baldwin is a mere whistle alarm valve like the prior art actual valves, such as the Reliance valve, appellees' Exhibit A, which were such failures that they caused the appellant to invent the inventions of the patents in suit to meet the need caused by the failures of these prior art whistle valves [R. pp. 38-42].

The appellant made this very clear at the trial of this case [R. pp. 38-39], as follows:

"Q. By Mr. Jamieson: How did you come to invent the patents in suit? Will you tell us the story?

A. I manufactured alarms for a number of years, and the alarms were pretty good, but I noticed a few customers began to take the alarms off because they said the firemen wouldn't pay any attention to the whistle and would continue whatever they were doing, and the water in the boiler would get low anyway,

even with the whistle blowing. So I contacted the manufacturers of alarms other than myself at that time, and tried to find some concern that would make an automatic fuel shut-off valve that would operate in connection with the alarm. Well, there was none at that time on the market, and . . .

Q. Did you make any other investigations? A. Well, in the fields, of course. There was nothing of that kind in use and nothing on the market, so I began experimenting for a means to accomplish this, and I finally accomplished it in '33. Then I think I sold my first complete unit in 1934, and during the next year I applied for a patent on the entire device.

Q. What were some of the troubles that you encountered that caused you to make the invention of the patents in suit? A. Well, a great many customers were even taking the alarms off alone.

Q. Why? A. Because the firemen would hear the whistle blow and they would think they had so much time before they would actually have a dangerous condition, and they would continue doing whatever they were doing, and often times they were busier longer than they thought they would be, and the water would continue until it got to the dangerous point.

Q. What happened when it got to the dangerous point? A. Well, when it got to the dangerous point they either had to shut the boiler down completely, or the fireman would take a chance on putting the water in the boiler, and I know in at least one instance the fireman took that chance of putting the water in the boiler and blew it up." [R. pp. 38-39.]

This Baldwin device is exactly the same as those prior alarms whose deficiencies the invention of the patent in suit was invented to overcome.

Baldwin has a high water alarm valve C-19, and a low water alarm valve, C-22, but it has no consecutively actuated secondary valve that could be used to shut off the fuel line after the water in the boiler had receded below the point where the whistle starts blowing for the low water alarm (C-22).

In Baldwin the steam valve C-3 operates on the *upward movement* of float C, and, which is fatal to Baldwin as a limitation in this case, this steam valve C is actuated *between* (and hence *before*) valves C-19 and C-22 that sound alarm G.

Also steam valve C-3 can *never* be actuated *after* the whistle alarm G has been sounded.

In this patent in suit to Blanchard a master control unit is provided whereby a fuel shut off valve can be closed *after* a whistle alarm has been sounded and the level of the water has fallen. This is not possible in Baldwin.

In other words *Baldwin has no master control unit like that shown in Figure 2 of this patent in suit No. 2,199,611, to consecutively open two steam valves on the downward movement of the float 33.* (See Figures 1 and 2 of patent No. 2,199,611.)

This master control unit is an essential characteristic feature of the patents in suit. It is an element of the combination of the second patent in suit No. 2,233,395, and it is the subject of the first patent in suit No. 2,199,611.

In other words the first patent in suit No. 2,199,611 covers the details of one kind of master control unit, and the second patent in suit includes any kind of a master control unit as an element of its claimed combinations.

Baldwin's lack of a master control unit completely disqualifies it as a reference and prevents it from limiting the scope of the claims of the patents in suit.

The presence of this vital master control unit in this patent in suit demonstrates and proves that this patent in suit, No. 2,199,611, is a *substantial advance* over this patent to Baldwin No. 716,982, which has no master control unit.

In the Lower Court the appellees offered drawings and arguments attempting to change and modify Baldwin to make it look like this patent in suit.

But the law is very clear that the appellees may not change the inadequate prior art cited by them or make theoretical modifications in it to try to produce the patent in suit.

In *Wensel v. Goldhill Hardware Mfg. Co.*, 21 F. 2d 974 at page 976, Judge McCormick said:

"I think that by relying on Vachette modified, defendant confesses that the French patent does not anticipate Wensel's concept as shown by the patent in suit. *The modified Vachette is not a part of the prior art.* (Citing cases.)

"The suggested modification has been made by *the light of Wensel's teachings. It is a subsequent art, created in the endeavor to defeat Wensel's concept.*" (Emphasis ours.)

See also:

Ludwigs v. Payson Mfg. Co., 206 Fed. 60 at page 64 (7th C. C. A.);

Diamond Power Specialty Corp. v. Bayer Co., 13 F. 2d 337 at 341 (8th C. C. A.).

Also mere comparison of the flimsy, impractical Baldwin device and the *proven success* of this patent in suit [R. pp. 41-42 and 86], shows that the patent in suit is a *substantial advance* over Baldwin, which issued in 1902 and never was anything more than a mere paper patent—a file in the Patent Office.

Clearly Blanchard is a great *step forward* over Baldwin.

(2) Wright, No. 668,302 Issued February 19, 1901.

Validity of this patent in suit, No. 2,199,611, over Wright has been finally held and demonstration of *prima facie* infringement of claims 1, 2 and 5 of this patent in suit by appellees' accused structure has been pointed out hereinabove.

It remains only to show that this patent in suit, No. 2,199,611 is a sufficiently *substantial advance* over this second, and last, "best reference," Wright, selected by appellees at the trial [R. pp. 212-212a]. This was shown by appellant at the trial [R. pp. 300-302].

One of the features of this patent in suit, No. 2,199,611, that is present in each of the claims in issue, Nos. 1, 2 and 5 is "a plurality of outlet passages" through the housing or plug. The specification of this patent in suit, No. 2,199,611 describes those passages at page 1, column 1, line 52, to column 2, line 6.

Each of these claims 1, 2 and 5 of this patent No. 2,199,611 specifically specifies that this "plurality", *i. e.*, "two or more," of outlet passages be "*through*" the housing or plug. The obvious reason for this limitation of the outlet passages being "*through*" the wall of the housing or plug is to *separately* "conduct the steam to any steam operated device" [Spec. p. 1, column 2, lines 5-6].

Separate outlets to separate steam operated devices that may be "opened one at a time in sequence," as claims 1 and 2 specify, are elements of the claims and essential ingredients of the patented combinations of the valid claims in issue of this patent in suit.

But these separate outlets are not present in Wright, No. 668,302, appellees' second "best reference."

Instead Wright has just one outlet, a-8 in Figure 1, and therefore Wright does not have a "plurality" of outlet passages.

Wright does not and cannot operate a plurality of “steam operated devices,” let alone operating them “one at a time in sequence,” as the claims in issue of this patent in suit specify.

Therefore Wright is not only not designed nor intended to do the work or perform the function of this patent in suit—but it cannot be used to achieve the result that is accomplished by the patented claims of this patent.

This ability to operate a plurality of steam operated devices one at a time in sequence in response to downward movement of the float is an inherent characteristic feature of the invention covered by the valid claims of this patent in suit. It is clearly not present in Wright. Therefore the invention of this patent in suit represents a *substantial advance* in the art over this patent to Wright, which issued in 1901, and is a mere paper patent that never helped solve the problem that was so successfully met by the invention of this patent in suit [R. pp. 41-42].

There is no way that any of the claims in issue of this patent in suit No. 2,199,611 can be stretched or “interpreted” to make any of them cover this Wright device. No amount, range or degree of liberality of construction of any of the claims in issue 1, 2 or 5 of this patent in suit No. 2,199,611, in order to cover the appellees’ accused devices could possibly *by that same construction* cover this Wright device.

Also the construction of the claims in issue of this patent in suit that is necessary for the appellees’ accused devices to be infringements of these claims describes a structure that not only is not anticipated by Wright *but*

also it represents clear invention over Wright, because it is a substantial advance over Wright.

The invention of this patent in suit represents a *substantial advance* over Wright because:

1. Wright does not have a plurality of outlet passages through the housing.

2. Wright cannot conduct steam separately to a plurality of steam operated devices.

3. Wright cannot operate a plurality of steam operated devices "*one at a time in sequence*" as specified in Claim 1 or "*in sequence, one after the other*" as specified in Claim 2 of this patent in suit No. 2,199,611.

4. Wright cannot operate a plurality of steam operated devices one at a time in sequence "*responsive to the downward movement of the float*" as specified in Claims 1 and 2.

On the other hand the structure invented by appellant and covered by the claims in issue of this patent in suit *can and does* accomplish all of these obviously new and beneficial results and so it constitutes a *substantial advance* over Wright, as well as over the rest of the prior art.

Therefore this patent in suit is a *substantial step* in the art over appellees' second "best reference" Wright.

II.

The Appellees' Asserted 1932 Installation at the Continental Lease at Seal Beach.

Appellee tried to invalidate the second patent in suit, No. 2,233,395, by attempting to prove an installation at Seal Beach, California on the lease of the Continental Oil Company of an alleged anticipating device. They may attempt to apply it to the first patent in suit, No. 2,199,611, so appellant will dispose of it here for both patents in suit.

This asserted 1932 structure was so weak and ineffectual that it is as if they had never tried to prove it.

Appellant will now review the proofs and reasons showing this.

(1) The Asserted 1932 Structure Was Never Proven as to What It Was so It Is Not Part of the Prior Art.

The Lower Court attempted to dispose of this issue with these words:

“It need not rise to mathematical certainty.” [R. p. 15.]

This was clear error. It was amplified by appellees in their 10th and 11th “finding of fact” [R. pp. 21 to 22] which the Lower Court obligingly signed for them. But these “findings” are in direct conflict with the appellees’ own witnesses.

The record, on the other hand shows that though *something* was installed at Seal Beach in 1932 *no one knew the mechanical construction of what was installed.*

Taking first the so-called “conclusive” evidence of manufacture that was “found” to be “clear, satisfying and convincing beyond a reasonable doubt”—the witnesses Harvill, Beck and Robson *proved absolutely nothing* under the familiar and well-known rules for proving a prior use.

Harvill's testimony shows he knew *absolutely nothing* about the combination—he merely made some parts which could have gone into a pump governor, and he had no records. His testimony shows his total worthlessness as a "prior use" witness [R. pp. 163-169, incl.].

Q. You never saw this valve before today, this particular valve, did you? A. No, I never saw that before today. I might have made it. I don't know . . . This particular valve might have been one of those we machined up for Mr. Pinkerton, or it might have been made yesterday.

Q. By Mr. Jamieson: You don't know when this was made, then? A. I don't know.

Q. You have never seen any of these drawings before today, have you? A. No; I haven't . . .

Q. There was never any part like this on Exhibit E, the top part? A. No. These parts from here up we had nothing to do with . . .

Q. But you didn't see them assembled at the plant? A. No. I don't know anything about that.

Q. And you don't know what the full combination of any of his parts was? A. No; not of this valve here or anything that went on after it went out. I don't know anything about those . . .

Q. You don't have any records back of 1935 of any of these transactions referred to, do you? A. No; I haven't. I have changed organizations and moved around and my records got kind of bulky. I might find them if I looked . . .

Q. That is strictly a matter of your memory, in your memory? You haven't refreshed it from any written documents? A. No. . . .

Q. By Mr. Jamieson: And the parts you did make, as far as you did go, could have gone into a pump governor or any place? A. That is right." [R. pp. 163-169, incl.]

Beck was equally uninformed about details and he proved nothing that would establish a “prior use” under elemental principles of patent law [see R. pp. 175-176].

“Q. Do you know anything about the parts that go above the port? A. No.” [R. p. 176.]

Finally, Robson, the only remaining witness to “conclusively” prove manufacture of an anticipating device completely broke down on cross-examination, despite the efforts of the Court to help him [R. pp. 179-180].

“Q. Mr. Robson, you didn’t know what these parts were used for after they left your hands, did you? A. No; I didn’t.

Q. And you were just given a print and told to make one part and passed it on? A. No; I don’t think we had a print . . .

Q. When did you first see this particular part? A. I think I saw it only today.

Q. Have you seen any of these parts before today? A. I have seen that part in Pinkerton’s car over a week ago,—or something similar, but I couldn’t say it was the same one.

Q. The Court: Do you mean you have seen something of the same kind but not this particular one? A. Yes.

Q. By Mr. Jamieson: You don’t know what it is used for, do you? A. No.

Q. You don’t know what the complete assembly is? A. No.” [R. pp. 179-180, incl.]

This witness gave the real key to the whole 1932 story—he saw something in Pinkerton’s car a week before the trial and was asked to testify about it. Presumably the others did the same.

This brief review of the asserted "manufacture" shows how completely the appellees' proofs failed and how erroneous is the 10th "finding of fact" on page 21 of the record on this appeal.

The appellees' attempts to prove "prior use" were as deficient as their above attempts to prove "prior manufacture."

In the 10th finding of fact [R. p. 21] "disinterested witnesses" Brown, Thornton and Dolarheid are relied on to prove prior use. Their testimony was as ineffectual as that of Harvill, Beck and Robson, *supra*.

Brown *knew absolutely nothing about the mechanical construction or mode of operation of the assembly he was in charge of installing*, as shown by his testimony.

"Q. Did you have drawings of any kind on that job? A. I don't remember.

Q. Have you any drawings now that would show what was in that job? A. No.

Q. Were you in charge of the work? A. In charge of the installation; yes . . .

Q. What was inside of the cap? A. I wouldn't know.

Q. Do you remember what was on top of the cap? A. No; I don't recollect right off the bat. I don't know.

Q. I want what you remember. A. Well, I don't remember.

Q. Do you remember what was below the cap? A. No.

Q. Do you remember what was to the side of the cap? A. No; I don't.

Q. Do you remember what the cap—or the function it performed? A. If I have to give the answer from memory, I can't, but, if I do from my knowledge, I can answer.

Q. I want to know what you remember about it.

A. I don't remember whether I got my ideas on it or my knowledge of it from what I saw then or from what I have seen since as to the assembly that they have there . . .

Q. You don't remember what they looked like?

A. No, I don't. . . .

Q. Do you know whether there was a valve in it?

A. No, I don't know.

Q. Do you know whether there were any arms on the valve? A. Are we still talking about that assembly down there?

Q. I am talking about the one that you say was so installed down there at the company that you were employed by, on the date that you mentioned on direct, that particular installation? A. Do you mean that part of the installation?

Q. I don't care about these drawings but I want to know what you remember of your own memory of what was constructed down there at the Continental Oil Company lease, I think you said, prior to 1933. I want to know what parts you can remember of your own independent memory and what they did? A. I wish I knew just exactly what you want me to give you.

The Court: He is trying to test your recollection to see if you remember the device that you said you knew of at that time; that is all. A. That is asking an awful lot of memory.

The Court: He is not trying to show that you remember. He is trying to show that you don't remember. He is cross-examining you. . . .

Q. There were no valves in it, were there? A. I wouldn't remember that.

Q. There was no hand mechanism to operate, was there? A. I wouldn't remember that, either.

Q. There was no manual release? A. No, I wouldn't remember that.

Q. There were no slots in the valve stem? A. I didn't see that.

Q. There was no diaphragm in it? A. I wouldn't remember.

Q. There was no leather cup or packing? You wouldn't remember that? A. Why, no. A construction crew doesn't get into those details if it is not part of their work. . . .

Q. By Mr. Jamieson: Did you ever run low on water and have to use this equipment? A. No; not to my knowledge. . . .

Q. You didn't hear it operate? A. I wasn't there. . . .

Q. When the whistle worked, did the fuel shut off at the same time? . . . A. I don't know now; no . . .

Q. Did you ever hear the whistle blow after that? A. No." [R. pp. 188-196, incl.]

Thorton was merely a workman, working for Brown and he knew even less than Brown, as shown by a few excerpts from his testimony:

"Q. Do you know whether the valve had a valve stem on it? A. Well, I don't remember.

Q. Do you remember whether there were any slots in the valve stem? A. No, I don't remember how it was made that way.

Q. Do you know whether it had one or two valves. A. No; I don't know." [R. p. 203.]

Dolarheid, the last witness that was supposed to “*Conclusively*” prove a structure like the claims in issue of the patents in suit in this case knew no more than the others, as the following excerpts from his testimony show:

“Q. Did you see what the inside looked like? A. No; I did not. . . .

Q. Was there a leather cup? A. No.

Q. Was there more than one valve in it to operate it? A. I wouldn’t know.

Q. Do you know whether there were any stems on the valves? . . . A. I wouldn’t know.

Q. Do you know whether there were any slots in the valve? A. I would not know that, either.
. . .

Q. Did you see the inside of any of the mechanism? A. No.” [R. pp. 209-211, incl.]

The foregoing analysis of all of appellees’ evidence shows that it was *wholly ineffective*.

As this Court said in *Bianchi v. Barili*, 78 U. S. P. Q. 5 at page 12:

“But when it comes to identifying ‘the machine’ as the accused device, Cortopassi’s testimony is **WHOLLY INEFFECTIVE**. . . .

“Cortopassi admitted that he had made only part of the rollers, had never seen the machine in operation, had never seen a ravioli come out of it, and had never seen any cutters on the rollers.” (Emphasis added.)

In view of the foregoing appellant submits that it was a gross abuse of discretion and a flagrant error for the Court below to sign [R. p. 25] the findings of fact in this case without striking out findings 10 and 11 on pages 21 and 22 of the Record herein.

The only remaining witness, the appellee Pinkerton himself, couldn't establish a prior use.

In the first place his testimony doesn't establish it, as shown by the excerpts cited immediately below.

In the second place, even if Pinkerton's testimony had identified the parts, it would not be enough because the testimony of one witness, especially a defendant, cannot establish a prior use under the authorities cited below.

Appellee Pinkerton failed utterly to prove *what* was installed at Seal Beach in 1932 as shown by the following excerpts from his testimony.

He wouldn't even testify that he was present at the alleged installation [R. p. 261].

He admitted he has never made any effort to find the structure alleged to have been installed at the Continental [R. p. 262], and therefore there is no foundation for secondary evidence.

He admitted that even the structure alleged to be at Seal Beach did not have delayed or consecutive action like the patented and accused devices [R. p. 265].

Pinkerton admitted that he has no records of his alleged installation [R. p. 266].

Pinkerton admitted flatly that the drawing, Exhibit H [Book of Exhibits p. 324], does *not* show what was installed at Seal Beach [R. pp. 287-288, incl.].

Finally, the uncorroborated testimony of the defendant Pinkerton alone will not be sufficient to establish and prove prior use by oral testimony alone, particularly since he is the defendant.—Walker on Patents, Deller's Edition, Sec. 63 at page 304.

Searchlight Horn Co. v. Victor Talking Machine Co., 61 Fed. 395 at page 401:

"The proof of prior use by oral testimony should be scrutinized very carefully. At best such method

of proof is unsatisfactory. Forgetfulness, liability to mistakes, *the power of psychological suggestion, innate tendency to remember what those calling witness desire, possible bias, prejudice, interest, or perjury*, all suggest the wisdom of the rule requiring the defendants to prove prior use *beyond a reasonable doubt by clear and convincing testimony*.

"Every reasonable doubt should be resolved against one attacking the validity of a patent.

"*The necessity of this rule is emphasized when the attack is based upon oral testimony alone of facts long past.*"

National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693 (C. C. A. 8), at page 703:

"The claim of the beam itself to antiquity rests on the testimony of ONE witness . . .

"The solemn grants of great franchises cannot be stricken down by testimony so flimsy and unsatisfactory.

"The memory of man is too brief and fleeting, too easily swayed by chance and by interest, to permit the recollection of ONE or two witnesses, prompted by presently prepared pictures of the proof desired to condition the validity of valuable patents that have stood unchallenged for years."

Mast Foos & Co. v. Dempster Mill Mfg., 82 Fed. 327 (C. C. A. 8), at page 332:

"The evidence of prior use is the testimony of a SINGLE witness, who was once in the employ of another infringer of the device of the appellant, but has since been employed by the appellee.

"He produces no part of the old windmill which he testifies was set up and put in operation before Martin

filed his application, and *his evidence is without the support of any patents or exhibits, and without the support of the testimony of any other witness.*"

Therefore, appellant respectfully submits that this asserted 1932 "prior use" should be rejected *in toto* for failure of proof.

(2) It Was Not Pleaded.

The Lower Court said in its opinion:

"The use of the 1932 structure was not pleaded as a defense, and cannot be considered as anticipation. (35 U. S. C. S. 69(5); and see *Electric Battery Co. v. Shimadzu*, 1939, 307 U. S. 5, 17)." [R. p. 14.]

The vital importance of this is that the fact it was not pleaded shows it was *an afterthought*.

If Pinkerton had *really* installed an anticipating device *he would have remember it the moment this suit was filed.*

3) No Device Like the Asserted 1932 Structure Was Proved.

Appellant first thought of his device in 1932 or 1931 [R. p. 100] and he built the first one in 1933 and sold one in 1934 [R. p. 101], subsequent to October, 1933 [R. p. 103], to *Tippett Drilling Co.* in Louisiana [R. pp. 104-105].

He made his first sale in California in 1938 [R. pp. 103, 105] and then *after* that, in 1939, he first saw appellees' accused device [R. p. 94].

Appellee Pinkerton corroborated this in effect by his evidence admitting that he started the drawings for his accused device in 1938.

His employee Correze testified: that it was "the last part of 1938" as follows:

"Q. Now, I show you another photograph that is marked Plaintiff's Exhibit 13, and ask you if you can identify that (as) a Pinkerton construction. A. Yes, it is.

Q. What is it? A. It is a fuel cutoff valve.

Q. Do you know when Pinkerton started making that construction? A. Yes.

Q. When? . . . A. . . . the last part of 1938. . . .

Q. Does that look like the first job that he put out? A. I couldn't say whether that was the first one, or not. They all looked alike.

Q. You don't remember seeing any of them before the latter part of 1938, is that it? A. No. . . .

Q. And is the structure shown in Exhibit 11 exactly like that that you made the first drawings for in 1938? . . . A. Yes." [R. pp. 24, 229.]

Appellee Pinkerton admitted [R. p. 267] that he saw appellant's patented invention at least in 1938.

These are the first fuel shut off valves made by appellees as proven in the record. They were made late in 1938.

If, as appellees contend, the 1932 installation was successful why were no other devices like it ever made?

That appellee Pinkerton copied appellant's structure in 1938 is obvious from a mere comparison of the two devices, Exhibits 5 and 12. If the Court will simply manipulate Exhibits 5 and 12 a few moments it will see how Exhibit 12 was copied from Exhibit 5.

This is most persuasive evidence that the asserted 1932 installation never existed—except in appellee Pinkerton's mind—and then for the *first time just before this trial*.

Also if the asserted 1932 structure had been made the fact that no other was made is persuasive that it was at most an ABANDONED EXPERIMENT and hence not a part of the prior art.

Pickering v. McCullough, 104 U. S. 310, 319, 26 L. Ed. 749, 752;

Deering v. Winona, 155 U. S. 286, 39 L. Ed. 153, 159;

Electrical Co. v. Champion Switch Co., 23 F. 2d 600, 603 (C. C. A. 2);

Barbed Wire Case, 143 U. S. 275, 292, 36 L. Ed. 154, 161;

Morey v. Lockwood, 8 Wall., 230, 19 L. Ed. 339, 342;

Kirchberger v. American Co., 124 Fed. 764, 777;

Farmers Mfg. Co. v. Spruks Mfg. Co., 127 Fed. 691, 693;

In re Coykendall, 29 F. 2d 868, 869.

- 4) The Asserted 1932 Structure Was Not Capable of Achieving the Results of the Patents in Suit, and Therefore It Cannot Limit the Scope of Any of the Claims in Issue Herein, Under the Law.

The primary result achieved by the patents in suit was the new function of warning the boiler attendant by a whistle that if he didn't attend to the water supply the fuel would be shut off in a short period of time.

This object and result was fully described in the specification as pointed out hereinabove.

This result was achieved by the patented combination including the master control unit which caused the consecutive actuation of the whistle and fuel shut off valves.

This delayed action is not possible in the asserted 1932 structure and it is present in the accused structure, as the

appellee Pinkerton flatly admitted at the trial [R. pp. 273-275, incl., and p. 265]:

“Q. By Mr. Jamieson: In your structure that you are now making the fires are put out by shutting off the fuel valve, isn't that true? A. Yes.

Q. And that is shut off a period of time after the whistle blows, isn't that true? A. What does the word 'period' mean?

Q. You don't know what 'period' means?

The Court: A lapse of time is a period of time, any lapse of time is a period of time.

A. Yes, yes.

Q. By Mr. Jamieson: On the other hand, on this device that is not an infringement, this Exhibit E and F, they operate simultaneously, don't they? A. Yes.

Q. Is there an advantage in having a lapse of time between the operation of the whistle and the operation of the fuel cutoff valve? . . .

Q. *Do you consider that as an advantage?* A. Under the present condition, *yes.*” [R. pp. 273-275, incl.] (Emphasis supplied.)

This was amplified by appellee Pinkerton as follows:

“Q. Was that in the one down at Seal Beach? A. Yes.

Q. When you open that single valve it causes the steam to go simultaneously into those two openings, doesn't it? A. Yes.

Q. So there is no period of time between the operation of one valve or the other, is there? A. No.

Q. Is there any way that that could be operated to cause delayed action of the opening of one valve instead of the other? A. This valve here?

Q. Yes. A. No.

Q. The device that is accused and charged to infringe, as shown in your catalogue, however, is susceptible to that delayed action, isn't it? A. That is right." [R. p. 265.]

Thus, clearly, *the asserted 1932 structure cannot achieve the result.*

That such a structure cannot limit the scope of the claims of a successful patent like those in suit herein [R. pp. 86, 289], is a well established principle of law.

One Piece Lens Co. v. Stead, 274 Fed. 667 at page 670;

Pickering v. McCollough, 104 U. S. 310, 319, 26 L. Ed. 749 at page 752;

Deering v. Winona, 155 U. S. 286, 39 L. Ed. 153 at page 159;

The Barbed Wire Case, 143 U. S. 275, 292, 36 L. Ed. 154 at page 161;

Farmers Mfg. Co. v. Spruks Mfg. Co., 127 Fed. 691 (4th C. C. A.);

In re Coykendall, 29 F. 2d 868 at page 869.

5) The Asserted 1932 Structure Adds Nothing to the Parker Patent No. 1,965,052.

Parker is disposed of fully hereinafter under patent in suit No. 2,233,395.

T H A D A S I M U L T A N E O U S L Y A C T I N G W H I S T L E A N D F U E L V A L V E.

That is the most that appellees can claim for their 1932 structure. The model, Exhibit F-2, admittedly made later, shows a single valve with a passageway from the steam chamber through a "Y" shaped passage to a whistle and fuel shut off valve—thus actuating them *simultaneously*.

Appellant proved that this does not embody his invention by his testimony at the trial [R. p. 292]:

“Q. By Mr. Jamieson: Is the structure of your patent present in that structure that was described at the Seal Beach installation? A. No, it is not.

Q. Why not? A. Because the fuel cutoff valve and the whistle operate simultaneously from the pressure emanating from a single valve.” [R. p. 292.]

Thus the Record and appellees’ own admissions *completely belie* the following erroneous statement of the Court below in its “Memorandum Decision”:

“The accused devices, subsequent to 1932, are, *so far as the record* shows, substantially the same as,—*if not identical*,—with the former device.” [R. p. 16.]

Therefore, *on the merits*, this asserted 1932 structure has no place in this case.

Certainly this patent in suit, No. 2,199,611, is a *substantial step* in the art over appellees’ asserted 1932 structure.

Section Summary.

Appellant has fully demonstrated that this patent in suit, No. 2,199,611, is a substantial step forward in the art over Baldwin and Wright, appellees’ only “best references,” and over appellees’ asserted 1932 use, and therefore appellant is entitled to a sufficiently liberal interpretation of the claims in issue, Nos. 1, 2 and 5, of this patent in suit No. 2,199,611, to cover appellees’ accused structure, which is a clear infringement of even the *prima facie* scope of these claims in issue.

Therefore the lower Court’s ruling should be reversed by this Court and this cause should be remanded to the lower Court with instructions to the lower Court to enter a decree holding the appellees’ accused structure to be an infringement of this patent in suit No. 2,199,611.

POINT (4).

Claim 1 of patent in suit No. 2,233,395 is infringed by the defendants' accused structures shown in Plaintiff's Exhibits 8 and 9 and illustrated in Plaintiff's Exhibit 11.

CLAIM 1.

The following elements of claim 1 of patent in suit No. 2,233,395 are clearly shown in the drawings and described in the specifications, they were shown at the trial to be equally clearly present in appellees' accused structure [R. pp. 72-84] and appellees will not deny, and therefore they will admit that they are embodied in their accused devices:

- (a) "*In a safety apparatus for boilers the combination of*" [see patent in suit No. 2,233,395, spec. p. 1, col. 1, lines 1-2 and R. pp. 72 and 273].
- (b) "*A fuel supply conduit*" [see R. p. 72].
- (c) "*A valve in said conduit*" [see spec. p. 1, col. 2, lines 37-38 and R. p. 72].
- (d) "*Means for yieldingly holding said valve open*" [see spec. p. 2, col. 2, lines 17-18 and R. pp. 72-73].
- (e) "*A compartment*" [see spec. p. 2, col. 2, lines 12-14, 26, 32, 36 and 38-39 and R. p. 73].
- (f) "*A diaphragm*" [see spec. p. 2, col. 2, lines 13-17 and R. pp. 73 and 271].
- (g) "*A protective liquid for said diaphragm in said compartment*" [see spec. p. 3, col. 1, lines 18-32 and R. p. 73].
- (h) "*Connections between said diaphragm and valve*" [see 74 in Exhibit 9 and R. p. 74].
- (j) "*Manually operable means for relieving the fluid pressure on said diaphragm*" [see spec. p. 2, col. 2, lines 34-36 and R. pp. 74-75].

The appellees will contest only element (i) of this patent, and appellant will now show that this element is equally clearly present in the appellees' accused structure.

- (i) *"Means for supplying fluid under pressure to said compartment for flexing said diaphragm and moving said valve to closed position."*

The means for supplying fluid under pressure to the compartment 72 and closing the fuel shut off valve 75 that are shown and described in this patent in suit are the valve 13 in the master control unit which supplies the steam and line 25a. These means for supplying fluid under pressure to the compartment to close the fuel shut off valve were fully described by appellant at the trial [R. pp. 290-292] and they are fully described in the specifications [p. 2, col. 1, lines 2-9], which at the same time describe their mode of operation, function and result.

This is repeated in the specification at page 2, column 2, lines 19-29.

These are the "means" for supplying steam ("fluid under pressure") to the compartment for flexing the diaphragm and moving the fuel supply shut off valve to closed position, namely, (1) "valve 13 in the master control unit," which is so set as to open when the water level has receded below the point where the whistle has sounded, and (2) pipe line 25a.

Appellee sought below to limit these means to just the second part of them, namely pipe line 25a, to try to make them read on their asserted 1932 structure. But the specification and drawings show these means also include a master control unit set to operate *after* the water level has receded below the point where the whistle has sounded.

This is the whole point of the invention—a prod to the boiler attendant to make him go to work after the whistle has sounded and *before* the fuel valve is closed, shutting off the fuel.

That this is the object of this invention is shown by the object part of the specification of this patent in suit at page 1, column 1, lines 14-23.

All of these “means”—the master control unit, the previously operating whistle alarm valve and the pipe line 25a—are necessary to accomplish these objects.

It was error for the lower court to accede to appellees’ theory that these “means” were only the pipe line 25a in order to try to make the invention of this claim closer to their asserted prior art 1932 “Continental” structure.

This is a patent that is entitled to a *liberal construction*. This liberality of construction as often shows itself in a *narrowing* as in a *broadening* construction to save the validity of the patent and hold the defendant as an infringer.

Walker on Patents, Deller’s Edition, Section 241, at pages 1206-1207 and cases cited states that this liberality of construction accorded meritorious inventions as often shows itself in a *narrow* construction as in a broad one, and, where it becomes necessary to construe a claim *narrowly* to hold it valid and infringed, courts will give such a *narrow* construction if they can do so consistently with the language of the claim and of the description.

Finally, to prove that this is not just an accidental mention in the specification, the concept here in issue is stated at still another, or fourth, place in the specification, namely, at page 2, column 2, line 65, to page 3, column 3, line 4.

Thus, to state it succinctly, *claim 1* of this patent in suit, No. 2,233,395, is *limited* by this element and by the parts of the specifications to which it refers, *to a sequentially operated master control unit*.

This limitation is present in appellees' accused devices and it is *not present* in appellees' asserted 1932 "Continental" structure or in any of appellees' prior art patents.

This was proven at the trial by appellant as follows:

"Q. By Mr. Jamieson: Is the structure of your patent present in that structure that was described at the Seal Beach installation? A. No, it is not.

Q. Why not? A. Because the fuel cut off valve and the whistle operate simultaneously from the pressure emanating from a single valve." [R. p. 292.]

Limitation of the claim of this patent by the specification is conceded by the Lower Court [R. p. 12] to be proper and legal.

Appellant therefore admits that the above limitation is a part of the claim of this patent.

This claim, therefore, will be deemed to include the limitation of a sequentially operated master control unit hereinafter.

The 7th "Finding of Fact" in this case, set forth at page 20 of the record on appeal, says that this element "means for supplying fluid under pressure to said compartment" "must be read in the light of the specifications to include any conduit means such as pipe 25a shown in the Blanchard drawings." [R. p. 20.] It follows irrefutably that since this element "must be read in the light of the specifications" to include *one* element, namely, pipe 25a, it *must also* "*be read in the light of the specifications quoted hereinabove to include the other necessary element, namely, the SEQUENTIALLY OPERATED MASTER CONTROL UNIT, which is just as important and just as much a part of the "means" as the "pipe 25a."*

Turning to the appellees' accused structure it will be quite obvious that all of this structure is present, both in letter and in spirit, in appellees' accused structure.

Appellees' accused structure has a whistle valve and a master control unit, which operates the whistle valve when the water level has receded below the point where the whistle is desired to be sounded and then a predetermined period later this master control unit allows fluid under pressure to move along conduit 25a to the compartment 72 to close this fuel shut off valve 75.

This is fully shown by appellant in his testimony on direct and on rebuttal at the trial [R. pp. 74, 77, 81-82 and 290-292]. Comparison of the description of these means in the specification of patent in suit, No. 2,233,395, as outlined hereinabove, under this element in the description of this patent in suit, and as testified at the trial at the above pages of the Record herein, with the appellees' structure shown at Figure 2 in the lower right-hand drawing of Exhibit 9 and at Figure 3 in the upper right-hand drawing of Exhibit 9, together with the cross-sectional view shown in Figure 2 in the lower right-hand corner of Exhibit 10, shows clearly the presence of these means, both in letter and in spirit, in the appellees' accused device.

As is seen in Figure 3 in the upper right-hand corner of Exhibit 9 the fluid under pressure is stored in the alarm body above the water on which the float 3 rests. When this water recedes and carries with it the float 3, at a predetermined point in this recession the valve marked 15 in Figure 2 in the lower right-hand corner of Exhibit 10 is pulled off its seat, which is marked 13 in Figure 2 in the lower right-hand corner of Exhibit 10, and which is marked 15 in Figure 3 in the upper right-hand corner of Exhibit 9. Pulling this valve off its seat makes the steam from the space above the water in the alarm body go past this valve and its seat, through the passageway, marked 16 in Figure 3 in the upper right-hand corner of Exhibit 9, to the pipe 24 which leads to the whistle 26 shown in Figure 1 of the right-hand side of Exhibit 8. This pipe

24 is also shown at 11 in Figure 2 in the lower right-hand side of Exhibit 10.

Therefore when the water in the alarm body recedes still further, carrying with it the float 3 a predetermined distance, which appellee Pinkerton testified was about between $\frac{5}{8}$ and $\frac{3}{4}$ of an inch in his accused device [R. p. 272], a second valve, marked 16 in the drawing Figure 2 in the lower right-hand corner of Exhibit 10, is pulled off of its seat by the further lowering of the float 3 and the lever 20, leaving the seat 13 open and permitting the steam or fluid under pressure to leave the space in the alarm body above the water and proceed along the pipe 12 in Figure 2 in the lower right-hand corner of Exhibit 10 or the pipe 25a in Figure 3 in the upper right-hand corner of Exhibit 9. This fluid under pressure then progresses down pipe 25a shown in Figure 1 in Exhibit 8 to the top of the fuel cut-off valve 20 where it enters the chamber 72, as shown in Figure 2 in the lower right-hand corner of Exhibit 9. This pressure then moves against the member 73, which is the equivalent of the diaphragm, and moves it downward thus closing the valve 75 against its seat 76 with the help of its connection 74. This valve 75 is held against its seat 76 by the pressure in the chamber 72, which is retained there by the valve marked 16 in Figure 2 in the lower right-hand corner of Exhibit 10 remaining on its seat 13, thus holding the pressure in the chamber 9, the pipe 12 which is numbered 25a in the other drawings, and the chamber 72. This valve 16 is held on its seat by the elevation of the float when water is poured in. When valve 16 isn't on its seat the steam pressure in the alarm body above the water is great enough to pass down the passageway outlined, namely, space 9, pipe 25a or 12 to chamber 72, and this steam will hold the fuel shut-off valve 75 on its seat 76.

When water is fed into the boiler and its alarm body, which is connected to it, the level of the water will rise and it will carry with it the float and raise it to the position shown in Figure 1 in the upper right-hand corner of Exhibit 10 and in Figure 3 in the upper right-hand corner of Exhibit 9. This float and its attached arm and pin mechanism then hold the valve 16 on its seat 13 [See Figure 2 in lower right-hand side of Exhibit 10], thus acting to prevent the pressure from returning from the compartment 72 to its source of supply, the chamber above the water in the alarm body and the boiler.

This means is fully described in the specification and is shown in the drawings of the patent in suit, as was fully pointed out hereinabove under this element in the description of this claim of this patent in suit.

Also infringement of this element was fully shown by the appellant, Mr. Blanchard, on direct testimony and also on rebuttal in this case [R. pp. 43-84; 290-292].

Finally the appellee, Pinkerton himself, admitted that his structure has these infringing elements operating in substantially the same manner and producing substantially the same results as follows:

“As it (the float operated lever) starts down it first opens a whistle, as this valve starts to open, then as it drops down it catches this second lever, this boss with the hole in it. It can drop about five-eighths to three-fourths of an inch. It catches and opens that one, lets steam pressure go down through to the copper line leading to our fuel valve, and allows it to build up a pressure and close the fuel valve.” [R. p. 250.]

Later, on cross-examination, appellee Pinkerton corroborated and amplified this, pointing out that his structure did the same work as the Blanchard structure

and that the Pinkerton structure did nothing in addition to the work done by the Blanchard structure as follows:

“Q. If the second valve is hooked up to the fuel shut-off in your device, the lowering of the arm past the point where the first valve is opened to the point where the second valve is opened will not perform any additional function or work than closing the fuel shut-off valve, will it? * * * A. Yes, it will close it.

Q. It will close it? A. Yes.

Q. It doesn't do anything else besides close it?
A. That is all.

Q. So that the work that the second valve in your structure, Exhibit 12, does, and the work that the second valve in the Blanchard structure, Exhibit 5, is exactly the same, isn't it? A. I would say the job was the same, yes. * * *

Q. By Mr. Jamieson: The result is exactly the same? A. Yes.

Q. And the way that that result is accomplished is the same in both valves, isn't it? A. Yes.” [R. pp. 283-284.]

Therefore infringement of this element by the appellees' accused structure is clearly shown and admitted.

The appellee Pinkerton admitted the advantage of the inclusion of this element in the combination as shown at his testimony in the transcript as follows:

“Q. Is there any reason for having a time interval between the blowing of the whistle and the shutting off of the fuel valve? A. On drilling rigs, yes, because they have a constant attendant at the boilers. I mentioned a few moments ago if steam pressure drops down very much it is VERY IMPORTANT

on the drilling rig, as the water drops down a little bit, sounding an alarm as a warning signal to the fireman or engineer, it gives him time to correct his water level in the boiler before the water drops low enough to shut out his fires, which is *very dangerous* on a drilling rig.” [R. p. 250.]

What he obviously means is that it is “dangerous” for the well, not for the boiler, as the drill stem is liable to get stuck if the steam pressure gets too low.

The specifications and claims should be read liberally and not be construed with legalistic rigidity. They should be read to preserve to the inventor what he actually invented and not some monstrosity created by the defendant’s twisting and “interpreting” of the claims and specifications.

This Court stated the true rule in *Bianchi v. Barili*, 78 U. S. P. Q. 5 at page 9:

“In the first place, considerable latitude in semantics is permitted to an inventor. As was said in *H. J. Wheeler Salvage Co. v. Rinelli & Guardino* (D. C. N. Y.), 295 F. 717, 727, ‘a patentee has the right to use such words as to him best describe his invention, and they will be so construed as to effectuate that result.’

“Second, the specification and the claims of a patent are *not* to be construed with *legalistic rigidity*. Here, as elsewhere in the law, ‘the letter killeth, but the spirit giveth life.’ . . .

“‘The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation.’ ” (Emphasis added.)

It is well to note at this point that claim 1 of Patent No. 2,233,395 does not include the limitation found in Claims 2 and 3 of that patent of "non-return means to prevent back flow of fluid from said compartment" 72.

The fact that this element is present in claims 2 and 3 but not in claim 1 prevents appellees from contending that this element of "non-return means" should be read into claim 1.

Instead, reading the patent "from its four corners," the difference between claim 1, which doesn't include "non-return means" and claims 2 and 3, which do contain that limitation, is that to infringe claim 1 it is not necessary that all of the fluid be retained in chamber 72 until released by manual release 78, but only that some fluid pressure remain in chamber 72 to be "relieved" by the manually operable means.

Certainly in appellees' accused structure even if some of the fluid in chamber 72 surged back or back and forth from the chamber 72 to the source of supply, enough pressure is left in chamber 72 to hold fuel shut off valve 75 against its seat 76 until manual release means 78 are opened.

The foregoing shows clearly that each and all of the elements of claim 1 of patent in suit No. 2,233,395 are present in the defendants' admitted structure.

To cut down space in this brief in compliance with the order of this court and to simplify the issues on this appeal, appellant hereby withdraws claims 2 and 3 of patent No. 2,233,395 from issue on this appeal.

It remains only to show that the clear *prima facie* infringement of claim 1 of patent No. 2,233,395 cannot be evaded by appellees because of any prior art cited by them in this case.

The Art Prior to Patent No. 2,233,395.

The prior art cited by appellees does not limit the claims of patent in suit No. 2,233,395 and the clear prima facie infringement of these valid claims is not avoided or evaded by any prior art references.

Appellant will first dispose of the prior art references selected by appellees at the trial as their "best references" [R. pp. 212 and 212a] and that will dispose of the remaining references cited by the appellees in their answer. None of this prior art in any way limits any of the claims of this patent in suit.

1. THE APPELLEES' BEST REFERENCES.

(1) Parker No. 1,965,052, issued August 3, 1934.

This Parker device does not have the elements of the claims of this patent in suit, it does not have the mode of operation of the claims of this patent in suit, and it is not designed to, nor is it adapted to, nor was it actually used to achieve or accomplish the results that are achieved by this patent in suit. This was proven at the trial [R. pp. 293-296].

The Parker device is not a "safety apparatus for boilers," but is a mere regulator to increase or decrease the amount of fuel. Also it was not designed nor intended to do the work of this patent in suit.

The differences between this patent in suit and Parker make Parker so remote as to not even affect this patent in suit.

No Master Control Unit to Effect Fuel Shut-off After the Water in the Boiler Has Fallen Below the Point Where a Whistle Has Sounded.

There is no master control unit in Parker to close the fuel shut-off valve after the water in the boiler has receded below the point where a whistle is sounded. This is perhaps the most essential characteristic feature of the invention of this patent in suit. It is stated fully in the objects of this patent in suit. It is described fully in the specification, it is shown in the drawings and it is included in all of the claims of this patent in suit, as it is the "means for supplying fluid under pressure to the compartment to close the fuel shut-off valve" in order to accomplish the sensational results that are accomplished by this patent in suit.

The lack of this master control unit to effect delayed action of a fuel shut-off valve after a whistle has warned the boiler attendant that if he doesn't take care of the water supply the fuel supply will be shut off is a fatal defect as a reference in this Parker patent as well as in all of the prior art patents. It is neither shown nor suggested in any prior art patent cited by the appellees or found by the Patent Office.

On the other hand, Parker serves to illustrate the failures and deficiencies of the prior art. Parker shows a whistle which is actuated when the water supply gets to a predetermined point and when this whistle is operated there is a *simultaneously* acting valve which will cut down the amount of fuel, or even temporarily shut it off. This fuel valve in Parker, however, works *simultaneously* with the whistle valve and there is no means suggested or shown for actuating the fuel valve *after* the water has receded below the point where the whistle is sounded.

The fuel control valve 34 and the whistle valve 27-28 operate *simultaneously* and *not consecutively*.

(2) SUTHERLAND No. 1,209,355 ISSUED DECEMBER
19, 1916.

This patent is also quite remote from this patent in suit and in no way constitutes any limitation on any of the claims of this patent in suit, as was fully shown at the trial [R. pp. 296-297].

Some of the essential characteristic features of this patent in suit which are not present in Sutherland and which therefore distinguish Sutherland from this patent in suit are as follows:

1. Sutherland is a "feed water regulator" and it is not a "safety apparatus for boilers." Therefore, Sutherland is neither designed nor intended to do the work of this patent in suit.

2. There is no "fuel supply conduit" in Sutherland and this is an element of all three claims of this patent in suit.

3. There is of course no fuel shut-off valve and no "master control unit" to consecutively supply fluid under pressure to a whistle valve and to a compartment to shut off a fuel shut-off valve after a lapse of time following the blowing of the whistle when the water reaches a dangerously low point in the boiler.

Sutherland neither suggests the need nor indicates the solution of that need furnished by this patent in suit.

4. Of course there is no manually operable means to relieve the pressure in a compartment so as to permit a fuel shut-off valve to be reopened after it is positively closed.

The fact that Sutherland has a float 42 and a line 32 leading to a chamber above a piston does not make Sutherland a relevant reference. There is no master control unit in Sutherland to actuate consecutively a whistle and

a fuel shut-off valve to closed position after the level of the water in the boiler has fallen from the point where the whistle is blown to a lower point.

Reading claim 1 of this patent in suit upon the appellees' accused structure, set forth in detail hereinabove, is not in any way impaired, lessened or interfered with by this Sutherland patent No. 1,209,355. There is no way that a Court could rightfully say that, though the claims of this patent in suit in their *prima facie* interpretation read clearly upon the appellees' accused structure, this *prima facie* interpretation of the claims in issue would also read on Sutherland and therefore it cannot be used to read upon the appellees' accused structure. Since this is not true there is no way that appellees can use Sutherland to evade the clear infringement of the claims in issue by their accused structure.

(3) HORRIDGE, No. 930,860—ISSUED AUGUST 10, 1909.

This Horridge patent will not enable appellees to evade the clear infringement of this patent in suit by their accused structure any more than the patent to Sutherland No. 1,209,355, disposed of hereinabove, as appellant showed at the trial [R. pp. 297-298].

Horridge is not a "safety apparatus for boilers" and it neither suggests nor shows the invention of this patent in suit. Horridge was not designed nor intended to accomplish the results accomplished by this patent in suit and in fact Horridge demonstrates the *forward step* in the art made by this patent in suit.

There is no fuel supply conduit shown or described in this Horridge patent and, therefore, of course, there is no fuel shut-off valve and, most important, there is no master control unit to actuate a fuel shut-off valve into closed position after a lapse of time following its actuation of an alarm whistle or after the water in a boiler

has receded below the point where the alarm whistle was sounded.

The elements of claim 1 of this patent in suit are absolutely missing from Horridge, there being no "manually operable means to relieve the fluid pressure."

The concept of this patent in suit simply is totally absent from Horridge, which shows merely a flow valve for regulating or controlling the flow of steam under pressure.

There is no master control unit to close a fuel conduit after a period of time has elapsed following its performance of another operation, such as blowing a whistle.

The absence of these features and of many of the elements of each of the claims of this patent in suit make it obvious that this patent to Horridge No. 930,860 cannot in any way limit the scope of claim 1 of this patent in suit, or enable the appellees to evade their clear infringement, by their accused devices of this patent in suit.

(4) SPILLER, No. 229,644—ISSUED JULY 6, 1880.

This is a steam pump regulator, neither designed nor intended to act as a fuel shut-off valve, or a "safety apparatus for boilers." There is no fuel supply conduit in this structure which has nothing to do with fuel supply, as was shown by appellant [R. p. 298].

This Spiller device is neither constructed nor intended to do the work of this patent in suit and it will not accomplish the new, pioneer and beneficial result achieved by this patent in suit.

Many of the elements of each of the claims of this patent in suit are completely absent from this Spiller structure. There is no "fuel supply conduit"; no "diaphragm," or equivalent thereof, and no "protective liquid

for said diaphragm in said compartment,” to name a few familiar absentees.

Perhaps the most fatal omission from this, and the other prior art cited by the appellees, is that there is no master control unit to supply fluid under pressure consecutively to an alarm and then to a fuel shut-off valve compartment after the water in a boiler has fallen below the point where the alarm has been sounded. This basic feature of this patent in suit, namely, the *master control unit*, is neither suggested, shown nor described in this Spiller patent.

Another element of claim 1 of this patent in suit that is missing in this Spiller patent is “manually operable means for relieving the fluid pressure on said diaphragm.”

This patent in suit has been held valid over Spiller but the lower court erroneously held in effect that Spiller imposes such a limitation on claim 1 of this patent in suit that Spiller prevents it from being infringed by the appellees’ accused structure. If this Court will merely compare claim 1 of this patent in suit with Spiller No. 229,644, with the drawings of this patent in suit and with the appellees’ accused structure, it will immediately see how erroneous is the decision of the lower court, and how unfounded is the appellees’ position in this case. There is no way that Spiller can act as a sufficient limitation on claim 1 of this patent in suit to enable the appellees to evade the consequences of their infringing acts.

The holding of the Court below that this Spiller patent and the other patents cited by appellees limit claim 1 of this patent in suit so as to enable the appellees to

evade infringement by their accused structure is the real fundamental error of the Court below that is the basis of this appeal.

When the great advantages to the public of stopping these dangerous explosions which were destroying lives and property at an alarming rate is contemplated, and when the appellant is given the *liberal interpretation* to which he is entitled, it will be seen that this Spiller patent and the other art cited by the appellees should not be permitted to deprive the appellant of his just rights, and should not be permitted to enable the appellees to evade the consequences of their obvious and flagrant infringing acts.

General Conclusions on Appellees' "Best References" for Patent in Suit No. 2,233,395.

These four patents, Parker, Sutherland, Horridge and Spiller were selected by appellees in the Court below as their "best references."

None of these patents is designed nor intended to accomplish the result achieved by this patent in suit. Also, none of these patents suggests possible alteration to achieve these results.

These patents are no closer to the patent in suit than the art cited in the Patent Office. They are just the usual obsolete, abandoned experiments that are dug up by defendants in patent infringement suits to try to evade their *prima facie* infringement. Appellant believes that when this Court carefully considers these four patents, Parker, Sutherland, Horridge and Spiller, it will feel as does the appellant, that they are the usual and typical

outmoded prior art and that they do not in any way limit the scope of the claim in issue of this patent in suit.

There is no way that claim 1 of this patent in suit can be twisted to read upon any of these prior art references.

Even the lower court admitted this flatly, as follows:

"The claims here would not read upon any of the references or on the best references." [R. p. 14.]
(Emphasis ours.)

Most important, the same interpretation of the claim in issue of this patent in suit that clearly reads upon and covers the appellees' accused structure, as set forth hereinabove, will not cover, or read upon any of these prior art references.

Therefore, the lower court erred in holding that this claim is not infringed by appellees' accused structure because of these prior art references.

Under the law, under the authorities and under the facts in this case, appellant is entitled to a *liberal construction* of the claim of this patent in suit, which may be qualified as a "primary" invention, because it represents a *substantial advance* in the art.

But even if the claim in issue of this patent in suit was deemed "secondary," for any reason, it would still have ample scope and range to include the appellees' accused structure without treading on the toes of any of these references in the prior art cited by the appellees, namely, Parker, Sutherland, Horridge and Spiller. *Bianchi v. Barili*, 78 U. S. P. Q. 5, at page 6.

Appellees' Other References.

The other references cited are even more remote than these "best references." It is not necessary to consider these other or "worst" references, since the appellees' "best references" are so remote.

2. APPELLEES' ASSERTED 1932 USE.

In its "Memorandum Decision" at page 14 of the record on this appeal the lower court held that this asserted "1932 structure was not pleaded as a defense, and cannot be considered as anticipation. (35 U. S. C. S. 69(5); and see, Electric Battery Co. v. Shimadzu, 1939, 307 U. S. 5, 17). However, such use may, together with the prior art as disclosed by prior patents in the field, be relied on to show want of invention. Such use may prove lack of invention or limit its scope." [R. p. 14.]

The lower court then went on to hold the patents in suit valid, thus holding that they have "invention" over the asserted 1932 structure.

Appellees did not appeal from this holding and so the patents in suit are now clearly valid over this asserted 1932 structure.

The only remaining question is can this asserted 1932 structure limit any or all of the claims in issue herein sufficiently to enable the appellees to evade their clear *prima facie* infringement. Appellant's reply to this question is given in detail hereinabove under patent No. 1,99,611, but it may be summarized as follows:

1. The asserted 1932 structure is entirely different. It is like the Parker patent No. 1,965,052, disposed of

hereinabove, because it has a *simultaneous* acting alarm valve and fuel shut-off valve. *Therefore*, like Parker, this 1932 structure:

- (a) Will not meet or anticipate any of the claims in issue, and
- (b) Will not invalidate any of the claims in issue for lack of invention, and
- (c) Will not limit any of the claims to enable the appellees to evade their clear *prima facie* infringement.

For these reasons the asserted 1932 structure is no better than Parker—it is the same as Parker—a mere cumulative reference at most.

The 1932 structure has no *consecutive* or delayed action by a master control unit between the blowing of a whistle and the cutting off of a fuel valve.

For this reason the 1932 structure is no better than Parker.

2. Also the asserted 1932 structure *was never proven as part of the prior art*.

No witness could describe it. On cross-examination all the witnesses fell down, as was shown fully hereinabove.

Also the device itself was never produced—only some admittedly later sketches and devices which one witness, appellee Pinkerton himself, said “were like” the asserted 1932 structure.

3. This asserted 1932 structure was not capable of achieving the results of the patents in suit and, under the following authorities it could not limit the scope of any of the claims in issue.

Prior Art Incapable of Achieving Results of Patent in Suit.

These prior art devices are not capable of achieving the results of this patent in suit and every reasonable doubt should be resolved against appellees in their attempts to limit the claims of this invention.

The lower court in this case said quite unequivocally that the appellees' prior art devices are not capable of achieving the results of the patent in suit as follows:

"Essentially, they are different in that they do not achieve the primary purpose of the present patents." [R. p. 14.]

That prior art to be effective to limit the claim of a later invention must be capable of producing the result designed to be obtained by the later invention is clear from the authorities, such as *One Piece Bifocal Lens Co. v. Stead*, 274 Fed. 667, in which the court said at page 670:

"The law is that prior inventions or discoveries, relied on to . . . LIMIT THE CLAIM of a later invention, must disclose a method capable of producing the result designed to be obtained. As said in Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821, the burden of proof rests upon the defendant to show that the invention relied upon as the defense was CAPABLE OF ACHIEVING THE RESULT, and every reasonable doubt should be resolved against it." (Emphasis ours.)

As was said in *Smith v. Snow*, 79 L. Ed. 283 at page 90:

"The character of the patent and its commercial and practical success are such as to entitle the inventor to broad claims and to a liberal construction of those which he has made."

Section Summary.

Appellant has fully shown that the adjudicated valid claim in issue of this patent in suit No. 2,233,395, is infringed by the appellees' accused structure and is not limited by the prior art.

Therefore the erroneous decree of the lower court holding that the appellees' accused structure does not infringe this patent in suit should be summarily reversed by this Court of Appeals and this cause should be remanded to the lower court with appropriate instructions to enter a decree holding the appellees' accused structure to be an infringement of this patent in suit No. 2,233,395, as well as an infringement of patent in suit No. 2,199,611.

Conclusion.

Wherefore, appellant prays that the Judgment, Findings of Fact and Conclusions of Law appealed from herein be reversed and that said District Court of the United States for the Southern District of California be ordered to enter a Decree and Judgment reversing the Judgment appealed from and be ordered to enter a decree in favor of the plaintiff in this cause as prayed for in the appellant's Complaint herein.

Respectfully submitted,

HAMER H. JAMIESON,

Attorney for Appellant.

No. 11,991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALVA G. BLANCHARD,

Appellant,

vs.

L. PINKERTON, INC., a corporation, and J. L.
PINKERTON,

Appellees.

APPELLEES' BRIEF.

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FILED
DEC 31 1948

PAUL P. O'BRIEN, -

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APPELLEES' BRIEF.

Statement of the Case.

This case involves the alleged infringement of Patents 2,233,395 and 2,199,611 owned by the Plaintiff-Appellant herein. These patents will hereinafter be referred to as the '395 patent and the '611 patent, respectively.

The trial court found that in view of the prior art each of the patents in suit should be strictly construed, and that, as so construed, the patents were valid but not infringed. The Complaint was therefore dismissed and that portion of Defendant-Appellees' counterclaim praying for invalidity of the patents was also dismissed.

The '395 patent of which only claim 1 is now in issue, (the appeal having been withdrawn as to claims 2 and 3 hereof), issued on an application filed by Appellant on October 14, 1935. The trial court found that all of the claims of the '395 patent must be specifically limited to the fuel valve assembly described in the patent and to the check valve 79 which is an essential part thereof.

The Court further found that the Appellee Pinkerton had, more than two years prior to the filing of Appellant's

earliest application, manufactured and sold fuel valve assemblies that, insofar as the claims of the '395 patent were concerned, were identical with the fuel valve assemblies alleged to infringe the '395 patent.

The application which matured into the '611 patent was a division of the application that became the '395 patent and was directed specifically to the needle valve assembly shown in the '395 patent. Claims 1, 2 and 5 which are the only ones in issue were found by the trial court to be limited to a single cross-pin operating a plurality of aligned needle valves, each of which has a slot in its valve stem, the slots being of different size and the valves being operated by a float lever.

Further with respect to the '611 patent the Court found that the accused devices did not have slots of different sizes in their valves, nor a single pin extending through slots in their valve stems, and that Appellees' means for operating the valves were not the equivalent of the structure recited in the '611 claims, but on the contrary were "entirely dissimilar from those shown in the '611 patent."

The principal contentions of the Appellant as set forth in his Opening Brief are:

- (1) That because Appellees did not cross-appeal herein, this Court is precluded from considering the question of the validity of the patents in suit, and
- (2) That the trial court erred in not holding the patents in suit to be pioneer patents and therefore entitled to a sufficiently liberal construction as to include the accused devices within the scope of their claims.

Point (2) above, of course is an admission that unless the patents in suit *are* pioneer in character they *cannot* be interpreted broadly enough to be infringed by Appellees' structures.

Summary of Argument.

A.

No Cross Appeal Is Necessary in This Case to Raise the Issue of the Validity of the Patents in Suit.

I. Appellees are not attacking the judgment of the lower court, but seek merely to affirm that judgment on any grounds which will support it.

The rule is well settled in this circuit that the Appellate Court may affirm on a ground not assigned by the trial court. Appeals in equity bring up the whole case and the decree below should be sustained if it was right for any reason.

This Court has consistently held that a void patent cannot be infringed and that the Appellate Court should inquire into the validity of the patent in suit on an appeal from a decree below of non-infringement and validity.

II. The public interest requires that the question of validity should always be considered by the Appellate Court.

B.

The Patents in Suit Cover Separate and Distinct Inventions and Cannot Be Combined to Vary Their Scope.

The Appellant in this case has two separate and distinct patents, one of which covers a particular fuel valve assembly and the other of which covers a particular needle valve assembly.

Throughout his Brief and particularly in his Point 1. Appellant in attempting to show that his patents are pioneers in the art, combines and commingles the disclosures of the two patents into an alleged invention not covered by either patent. The technique employed for

accomplishing this purpose is to interchangeably employ singulars and plurals when using the words "invention" and "patent", and to include in his "invention" everything disclosed in the specifications, whether claimed or not.

C.

The '395 Patent.

The claims of this patent are directed solely and specifically to the fuel valve 20 and its attached conduits shown in detail in Figure 6 of the patent drawings. All the rest of the disclosure in the patent drawings was either transferred to the '611 patent or abandoned.

Unless the '395 patent is strictly construed to include the check valve 79, it is clearly invalid. As so construed, it is not infringed since the Appellees admittedly do not have a check valve.

I. The Appellee Pinkerton in 1932 manufactured a fuel valve assembly identical with the structure accused under the '395 patent.

Appellees' fuel valve Exhibit E exemplifies the 1932 fuel valve manufactured by Pinkerton. The only difference between Exhibit E and the present fuel valves sold by Appellees is the location of the manual relief valve.

The manufacture and sale of the Appellees 1932 structure was fully proved by the testimony of unbiased witnesses and was clearly documented by drawings dated prior to Appellant's first date of invention.

II. Since Appellees accused fuel valve structure is identical with their 1932 structure, there can be no infringement of the '395 patent.

That which infringes if later, anticipates if earlier. Since the 1932 structure and the accused structure are the

same, and the former was prior to Appellant's first date of invention, there can be no infringement. If the Court were to find that the accused device came within Appellant's claims it would have to hold Appellant's patent invalid.

The Appellant attempts to circumvent this finding of the trial court by urging this Court to read into claim 1 of the '395 patent all of the unclaimed disclosure therein, and then to reverse the lower Court's finding that the claim is limited to the check valve 79.

III. Claim 1 of the '395 patent is invalid for want of novelty and invention over Parker No. 1,965,052 and is so limited thereby as not to be infringed.

The Parker patent discloses a complete boiler control apparatus including each and every element of Appellant's '395 patent. The elements of Parker are arranged in exactly the same relationship and perform the same function as Appellant's apparatus.

Appellant's only answer to the Parker patent is that the element in claim 1 "means for supplying fluid under pressure to the compartment" should be construed to include the plural needle valve and whistle assembly claimed in his '511 patent.

IV. Claim 1 of the '395 patent is anticipated by House No. 521,166 unless limited to check valve 79.

The file wrapper clearly shows that claim 1 of the '395 patent was allowed solely because the Appeal Board thought, based on misstatements in Appellant's Brief, that the claim included check valve 79 as an element thereof.

As claim 1 stands, each and every element thereof is clearly found in the House patent. If claim 1 is con-

strued as by the lower court to include the check valve 79, then there is no infringement since Appellees admittedly do not have a check valve.

V. The '395 patent is also invalid for lack of invention over the other prior art patents of record.

D.

The '611 Patent.

I. Unless strictly limited to the disclosure of the specification, the claims of the '611 patent are invalid.

Appellant's needle valve assembly is but a minor improvement over the Reliance High-Low alarm valves Appellant sold prior to making his alleged invention.

The three claims in suit all must be limited as found by the trial court to a plurality of aligned needle valves having slots in their ends with a single pin passing through all of said slots. If the '611 claims are expanded to include linkage operation of one of the valves such for example as employed by Appellees, the claims read squarely on the prior art patents.

II. The Appellees' 1932 structure.

In 1932, three years before Appellant's earliest date, the Appellee Pinkerton was manufacturing an alarm body including a float and a needle valve. When the float dropped and the valve opened, it blew a whistle and operated a fuel shut-off valve. This is exemplified in Appellee's Exhibit F.

III. Appellees' accused needle valve structure.

In producing the accused structure the Appellees merely added an extra needle valve to their 1932 structure as was well known in the old Reliance High-Low water alarm, and connected the second valve to the float arm by a conventional prior art linkage.

This construction of Appellees provides numerous advantages over that of the '611 patent and the apparatus is much less subject to failure.

IV. There is no infringement of the '611 patent.

As the trial court found, the claims of the '611 patent are limited to a single pin and a plurality of valves having slots all mounted on said pin. As the trial court further found, Appellees' structure is entirely different since Appellees employ a separate linkage to operate their second valve. Even without recourse to the prior art, there is no infringement of the '611 claims by the Appellees' needle valve structure.

V. Prior art patents pertinent to the '611 patent in suit.

The Baldwin patent shows a boiler control and safety system employing three aligned needle valves, two of which are sequentially operated when the water in the boiler gets too high. One of these valves blows a whistle and the other shuts off the feed water.

The needle valves of Baldwin are operated by linkage almost identical with that used by Appellees. Consequently, if Appellant's claims are expanded sufficiently to include the Appellees' needle valve structure, then they also read on Baldwin and are invalid.

The same is true of the Wright, Singleton, Humphrey and Wyatt patents, all of whom show lost motion linkages for operating a plurality of aligned needle valves by means of a float lever. In each instance, if Appellant's claims are expanded sufficiently to include the accused structure then they are invalid over any one of these prior patents.

ARGUMENT.

A.

No Cross-Appeal Is Necessary in This Case to Raise the Issue of the Validity of the Patents in Suit.

The Appellant in his statement of the case, and in his point 2 asserts that the validity of the patents in suit is not open to attack by Appellees herein because they did not file a cross-appeal. Various cases are cited as authority for Appellant's position, but an inspection of said cases shows that none of them is authority for Appellant's position.

As we will point out in the following discussion, the issue of validity in a patent case is always before the Appellate Court, and the Appellate Court not only can, but should, consider this issue.

1. Appellees Are Not Attacking the Judgment of the Lower Court, but Seek Merely to Affirm That Judgment on Any Grounds Which Will Support It.

The judgment of the Court below, insofar as it was favorable to the Appellees, dismissed the Complaint, and Appellees may support that part of the judgment which was favorable to them on any grounds urged below. This would be true, even though it involved an attack on the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it.

In the case of *Stoody Company v. Mills Alloys, Inc.*, 67 F. 2d 807, 20 U. S. P. Q. 1 (C. C. A. 9, 1933), this Court said:

"It is not necessary that a judgment be affirmed for the precise reasons that seemed controlling to the

lower court. In *McCloskey vs. Pacific Coast Company*, 160 Fed. 795, 801, the late Judge Gilbert of this Court said:

‘But notwithstanding that the theory upon which the Court below awarded its injunction may have been erroneous, the injunction must not be disturbed if in the pleadings and proofs we may discover any tenable ground upon which it may be sustained. * * *’

The foregoing rule was later enunciated in the case of *L. McBrine, Ltd. v. Silverman*, 121 F. 2d 181, 50 U. S. P. Q. 272 (C. C. A. 9, 1941), which was subsequently cited, with approval in the case of *Peterson v. Coast Cigarette Vendors, Inc.*, 131 F. 2d 389, 55 U. S. P. Q. 333 (C. C. A. 9, 1942).

In the *Peterson* case the District Court, as here, decided that the claims should be narrowly construed, and as so construed, that they were not infringed. On appeal, judgment was affirmed, *but on the grounds that the claims in suit were invalid*, the Court speaking through Circuit Judge Wilbur stating:

“Our power to affirm on a ground not assigned by the trial court is of course well settled.” (Citing *McBrine v. Silverman*.)

In the case of *Oliver Sherwood Company v. Patterson Ballagh Corp.*, 95 F. 2d 70, 36 U. S. P. Q. 364 (C. C. A. 9, 1938), the trial court found the claims to be valid and not infringed. The Plaintiff appealed from the decision and the Appellee cross-appealed. The Court stated, however, that the Appellee could, without a cross-appeal, attack the validity of the patent in suit in the Appellate Court.

The rule of the *Oliver Sherwood* case was followed in the later case of *Marchus v. Druge*, 136 F. 2d 602, 58 U. S. P. Q. 43 (C. C. A. 9, 1943), where the trial court had been silent on the question of validity of the patent in suit and the Appellees had not cross-appealed. This Court speaking through Circuit Judge Stephens stated as follows:

“* * * It has been declared in connection with similar problems that the Appellate Court is not restricted to the questions decided below, but may consider all material matters in issue. (Citing cases.) Our own Court by dictum has indicated its approval of the latter view in *Oliver Sherwood Company v. Patterson Ballagh Corp.*, *supra*, although in that case the trial court had held the patent valid but not infringed.

“We believe the better view gives the Appellate Court the right to investigate the question of invalidity, providing all of the evidence is before it, and where, as is true in this case, there is no conflict in the evidence upon the issues. We proceed to inquire into the validity of patent No. 1,892,435.”

In the case of *Willamette Hyster Company v. Pacific Car & Foundry Co.*, 122 F. 2d 492, 50 U. S. P. Q. 422 (C. C. A. 9), the trial court found all of the patents involved to be valid and non-infringed. Plaintiff appealed from the decree and the Defendant did not cross-appeal as to validity. The Appellate Court, there presented with exactly the same questions as in the case at bar, thoroughly

considered all aspects of the situation and stated as follows:

“Appellant contends that since no exception was taken by Appellee to the Master’s Finding that these patents were valid and since his report was approved by the trial court, their validity must be deemed admitted for the purpose of this appeal. It has indeed been held that under Equity Rule 66 an Appellant cannot attack the Master’s finding to which he has not seasonably objected prior to their approval by the trial court. (Citing cases.)

“Assuming that the law in this respect has not been changed by the new rules, we are of the opinion that these cases do not qualify the rule recognized by this Court in *Oliver Sherwood Company v. Patterson Ballagh Corp.* (C. C. A. 9), 95 F. (2d) 70, 36 U. S. P. Q. 364, in which we held that when the trial court had held patents valid but not infringed and Plaintiff appealed, the Defendant could upon such appeal and without cross-appeal, attack that portion of the findings and decree which held the patents valid. In the case at bar the judgment was for a dismissal. The Appellant in this case maintains contrary to the ruling of the lower court that its patents were infringed; but obviously the decree of the lower court was right if the patents were invalid, for a void patent cannot be infringed. In *Mills Novelty Company v. Monarch Tool & Manufacturing Company* (C. C. A. 6), 49 F. (2d) 37, 9 U. S. P. Q. 28, a patent infringement suit, the Court said: ‘Appellant (Plaintiff) insists we should consider only the questions which the District Court decided against it. This is not the rule.

Appeals in equity bring up the whole case (with certain inferences in favor of the decree below) and the decree below should be sustained if it was right for any reasons. (Citing cases.) We therefore hold that the validity of both the Walker and the Nourse and Wickes patents may properly be considered upon this appeal.' ”

2. The Public Interest Requires That the Question of Validity Should Always Be Considered, Whether Raised by the Parties or Not.

In the case of *Muncie Gear Works, Inc. v. Outboard Marine & Mfg. Company*, 315 U. S. 759, 62 Sup. Ct. 865 53 U. S. P. Q. 15, Mr. Justice Jackson, speaking for the Court, stated:

“We are not foreclosed from a decision under Section 4886 on the point by the obscurity of its presentation in the Courts below. * * * To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently present but so seldom adequately represented in patent litigation.

“We therefore hold that the claims in question are invalid under Section 4886 of the Revised Statutes and accordingly have no occasion to decide any other question in the case.”

It is believed that the law is well settled in this Circuit that appellees herein may raise before this Court the question of the validity of the patents in suit. Appellees both pleaded and argued invalidity in the trial court and are still convinced that the patents in suit should also have been held invalid by the court below.

B.

The Patents in Suit Describe and Claim Separate and Distinct Inventions and Cannot Be Combined to Vary Their Scope as Attempted by Appellant in His Point 1 and Elsewhere in His Brief.

Starting with his Point 1, Appellant throughout his Brief uses either the singular or the plural when speaking of invention and casually borrows disclosure from either of the patents in suit to support the validity or vary the scope of the other patent. This is highly improper and gives a false picture of *each* patent.

In his Point 1 Appellant by combining the subject matter *claimed* in each of his patents with what he *attempted* to claim in the '395 patent but which was finally rejected by the Patent Office, and by his careless or studiously casual interchange of singulars and plurals of the word invention, attempts to pose as a pioneer in the field.

But the facts are, that while Appellant started out in his '395 case to cover broadly the combination of first correcting the feed water, then blowing a whistle, and finally shutting off the fuel as the boiler water dropped, he wound up in his '395 patent with three narrow claims to his *fuel supply valve alone!* and in his '611 patent with narrow claims *specifically limited* to his precise structure.

All of the discussion in Appellant's Brief about the importance of warning the fireman *before* the boiler was shut down, has nothing whatsoever to do with this case because Appellant was not awarded any claims whatsoever covering that idea. All the Appellant was given by the Patent Office was:

- (1) His '395 patent which only covers a fuel valve assembly without regard to any whistle or any sequence of operations whatsoever, and

- (2) His '611 patent which only covers a particular assembly of three needle valves, without regard to where they are used or what apparatus they are used with.

The foregoing facts will be enlarged upon and amplified hereinafter in discussing the individual patents in suit. Suffice it to reiterate for the present, that Appellant does not have any patent coverage at all on what he alleges in his Point 1 to be a pioneer improvement and to entitle him to a so-called liberal construction.

C.

The '395 Patent.

The claims of this patent are directed specifically to the fuel valve 20 and its related structure shown in detail in Figure 6 of the patent drawings. Insofar as the claims are concerned, and particularly claim 1, it is unnecessary to refer to any of the other drawings or any of the specification except that directed to Figure 6.

Figure 1 of the patent is illustrative of one typical boiler installation in which the fuel valve 20 may be installed with or without other protective means such as whistles, feed water controls, etc. As previously mentioned, Appellant *tried* to get claims to the broad combination shown in Figure 1, but they were all denied.

The claims to the needle valve mechanism shown in Figures 2, 3, 4, 7a and b and 8a and b, were rejected by the Patent Office as being for a different and separate invention, and were divided out to become the subject matter of the '611 patent. Claims to the feed water valve assembly shown in Figure 5 were rejected and not pursued further.

As the patent finally issued, the entire invention, if any, was disclosed in Figure 6 alone, to-wit: the fuel valve assembly 20 which the trial court found included the check valve 79 as an essential element thereof.

This is set forth in Finding No. 4 as follows:

“The claims of the '395 patent all describe and must be specifically limited to the fuel valve assembly described in the specification and depicted in the drawings. Claims 2 and 3 are by their terms limited to ‘non-return means to prevent back-flow of fluid from said compartment.’ The only ‘non-return means’ disclosed or contemplated in said patent is the check valve 79 seen in Figure 6, and the claims are limited thereto. Claim 1, although it does not specifically recite the non-return means of claims 2 and 3, must, in view of the specification and prior art be considered to include said check valve 79 by reference. As so limited said claims are valid.”

As *so limited* by the prior art the trial court found claim of the '395 patent to be valid but *not* infringed, because the accused fuel valve assembly does *not* have a check valve or any suggestion thereof. Even the Appellant admits this.

As will be apparent from the discussion of the prior patented art in a later section, claim 1 is clearly invalid over several prior patents unless it is limited to the check valve 79 as ruled by the trial court.

It is Appellees' further contention that even when so limited it is nevertheless invalid.

1. The Fuel Valve Assembly Manufactured by Appellee Pinkerton in 1932 Was Identical With the Structure Presently Accused Under the '395 Patent.

Since Finding No. 10 [R. 21] is a complete answer to Appellant's attack upon the Appellees' early fuel valve structure, referred to in Appellant's Brief as the "1932 structure," and hereinafter referred to as such, we quote the Finding herein in full.

10. "The evidence shows conclusively that in late 1932 or early 1933 the Defendant Pinkerton manufactured and installed on a lease of the Continental Oil Company at Seal Beach, California, the boiler alarm and fuel valve control structures shown in Defendants' Exhibits E, E1, E2, F, F1, F2, F3, F4 and O. The details of said structures are shown by said Exhibits and were fully identified through the testimony of Defendant Pinkerton and of disinterested witnesses Brown, Thornton and Dollarhide, all of whom took part in said installation at Seal Beach. the manufacture of said apparatus being conclusively shown by disinterested witnesses Harvill, Beck and Robson. The testimony of all of said witnesses in all respects is found to be clear, satisfying and convincing beyond any reasonable doubt. The dates on the drawings illustrating Exhibits E and F are found to have been fully proved."

The Appellee's fuel valve Exhibit E was made from the same patterns as the first valves made in 1932. This fuel valve is shown in the photograph E1 and in the large drawing Exhibit E2 completed by R. C. Beck on April 19, 1935, six months prior to Blanchard's filing date of October 14, 1935. A simple comparison of Exhibits E, E1 and E2 with Appellees' present valve as shown in Figure

of Exhibit 9, shows that all of the parts of these two valve assemblies are substantially the same.

Both valve assemblies comprise a cylinder with a piston herein connected by a rod to an ordinary valve in the fuel conduit. The fuel valve is held open by the outward thrust of a spring on the piston and when steam is admitted to the top of the cylinder the piston moves down and closes the fuel valve.

Exhibit E was installed with a relief valve in the pipe fitting leading out of the top of the cylinder, whereas in Appellees' present structure the relief valve is built into the top of the cylinder. The schematic drawing Exhibit H dated 7-1-35, three months before Appellant's earliest date, shows a relief valve up near the alarm body for relieving pressure on all lines at once, and the witnesses to the Continental installation all testified that there was a relief valve on said installation.

There is absolutely no difference so far as the issues of this case are concerned, between Appellees' 1932 fuel valve assembly and their present fuel valve assembly. The Appellant stresses in detail the various elements of the presently accused valve structure, but as the trial court found, the Appellees were manufacturing this structure in 1932, nearly three years prior to Appellant's first date of application. Appellant produced no evidence carrying his invention back of his filing date, and consequently is restricted thereto [Finding No. 2, R. 18]. Consequently all of Appellees' drawings Exhibits E2, F2, F3, F4 and H which were conclusively proved to have been in existence at the dates they bore, are prior to the earliest date of Appellant's invention.

(a) THE TESTIMONY PROVING THE MANUFACTURE
OF APPELLEES' 1932 STRUCTURE.

Mr. Harvill, one of the outstanding industrialists of Southern California, testified [R. 150-168] that while he was superintendent of Master Equipment Company in 1932 they manufactured for Mr. Pinkerton a considerable number of alarm bodies identical to Exhibit F and fuel valve assemblies identical to Exhibit E, that Mr. Pinkerton discussed the design and use of these alarms and valves with him at length and that he assembled said valves and alarms prior to delivery to Mr. Pinkerton so as to check their operability.

Mr. Harvill further testified that since he had left Master Equipment Company about the middle of 1932, he knew the valve structures had to have been manufactured prior to that date.

Mr. George Robson, one of the mechanics at Master Equipment Company, corroborated Mr. Harvill's testimony, and stated unequivocally that while Mr. Harvill was superintendent at Master Equipment Company he, Robson, did machine work on parts which were identical with parts of Exhibits E and F [R. 177-180].

The testimony further showed that Mr. Harvill upon leaving Master Equipment Company opened his own shop and started doing work for Herberts Machinery Company in 1932, which fact was verified by Mr. R. C. Beck [R. 170-176] who went to work for Herberts Machinery Company on January 1st, 1932. Mr. Harvill identified each and every part of Exhibits E and F, stating that the castings were delivered to him and that his shop did all of

he machine work thereon and assembled and tested the same. Mr. Harvill's testimony was not refuted, and was further strengthened by his recollection that at the time of the March, 1933 earthquake he had had his own shop for quite some time.

Mr. Beck positively identified the drawings Exhibits E2, F2, F3 and F4 as having been made by him and dated on the dates they bear, all prior to Appellant's first proved date. Mr. Beck further testified that he made the drawings from completed parts given to him by Mr. Pinkerton, and that it took him quite some time to make the drawings because he worked on them in his spare time.

Mr. Pinkerton corroborated [R. 230-236] the testimony of Messrs. Beck, Harvill and Robson in each and every particular.

(b) PROOF OF THE CONTINENTAL INSTALLATION.

The fact that the Appellee Pinkerton installed one of his first boiler alarm and fuel valve assemblies at the Seal Beach lease of the Continental Oil Company some time prior to February 25th, 1933, was clear and convincing. The trial court after hearing the testimony of the various witnesses, viewing their demeanor and listening to their qualifications, saw that all of these witnesses were unbiased, reputable citizens who had worked for the same oil company for approximately twenty years. All of these witnesses testified that the installation of the Pinkerton alarm and fuel shut-off assembly at the Continental lease in Seal Beach was prior to the death of Mr. Frank Van

Slyke who was then superintendent. The date of Mr. Van Slyke's death is proved by the certified copy of the death certificate Exhibit G [R. 323].

Mr. Brown was construction foreman at the Seal Beach lease at the time of the installation, Mr. Thornton was Mr. Brown's assistant, and Mr. Dollarhide was the operator of the boilers on the lease. Each of these witnesses identified Exhibits E and F as being substantially identical with the alarm and fuel valve assembly installed at the Seal Beach lease. Each of these witnesses stated unequivocally that the apparatus installed at Seal Beach comprised a fuel shut-off valve operated by a piston to which steam was delivered when the boiler float went down. Messrs. Thornton and Dollarhide recalled that there was a bleed valve fitting in the top of the cylinder, while Mr. Brown could not recall specifically whether or not such a valve was installed by Mr. Pinkerton, but stated positively that if it wasn't put on by Pinkerton, then it was added by his own crew. All of these witnesses additionally fixed the date as prior to the March, 1933, earthquake.

Appellant seeks to minimize the testimony of these witnesses because they were hazy on some details. However, it is quite natural that witnesses fifteen years after the happening of an event should be hazy on some details, but as the trial court saw, these witnesses were not hazy on the essential features of the installation. The credibility of these witnesses was not impeached, and their testimony was straightforward, concise and to the point.

2. Since the Appellees Have Been Manufacturing and Selling the Accused Fuel Valve Assemblies or Substantially Identical Counterparts Thereof Since Prior to Appellant's Earliest Proved Date of Invention for the '395 Patent, There Can Be No Infringement of Said Patent by the Accused Fuel Valve Assemblies.

By reference to the trial court's opinion [R. 14, 15, 16] and Findings 10 and 11 [R. 21, 22] it is seen that Appellees' 1932 fuel valve structure, Exhibit E, was considered by the Court to negative the possibility of infringement of the '395 patent. The identity between the 1932 and the accused structures mentioned by the Court [R. 22] was stated to be "in so far as the claims of Blanchard's '395 patent are concerned."

In other words, the Court found that since the accused structure [or its equivalent, Exhibit E] had been made *in*ce *before* the alleged invention date of Appellant, there could not as a matter of law and fact be any infringement of the '395 patent. This ruling was correct.

It is a familiar rule of patent law that, "That which infringes if later, anticipates if earlier." If the trial court had held with Appellant that Appellees' fuel valve assembly was an infringement of claim 1 of the '395 patent, it would also have had to hold claim 1 invalid under the above rule, since its identical counterpart Exhibit E had been manufactured and sold long prior to Appellant's first proved date of invention.

The 1932 alarm body, Exhibit F, while also proved, was merely considered to be part of the general prior art with respect to the '611 patent, and was not held by the Court, or even urged by Plaintiff as a complete bar to the infringement charge under the '611 patent, as was the fuel valve Exhibit E under the '395 patent.

However, the Appellant has devoted fourteen pages of his Brief to a discussion of the 1932 structures, not as regards the '395 patent, but as to the '611 patent.

Beginning at page 38 Appellant attacks the testimony itself, and then on page 49 starts talking about "*the* patented combination including the master control unit which caused the consecutive actuation of the whistle and fuel shut off valves."

Just *what* combination Appellant is referring to is not stated. The discussion comes under the general heading of the '611 patent, but sub-heading (4) on page 49 says that the 1932 structure could not achieve the results of the patents in suit and therefore could not limit the scope of any of the claims in issue (claims of which patent?—or both patents).

It is next stated that "The primary result achieved by the patents (plural) in suit was *the* new function (singular) of warning the boiler attendant *by a whistle* that if he didn't attend to the water supply the fuel would be shut off in a short period of time."

Here the Appellant is again *combining* all the disclosures, patented and unpatented in his *two* patents, all into one neat package to confuse the issues.

Then at the bottom of page 49 it is stated that "This delayed action is not possible in the asserted 1932 structure and is present in the accused device" etc., and so on for several more pages winding up with a twisted interpretation on page 52 of the trial court's opinion.

It is quite evident that the Appellant, realizing that the 1932 *fuel valve* assembly, Exhibit E, is a complete bar to a holding of infringement of the '395 patent, has delib-

erately sought to confuse the issue by arguing that because the 1932 *alarm body* (needle valve assembly) Exhibit F is not an anticipation of the '611 patent (it has never been urged as such by Appellees) that *neither* of the 1932 structures, Exhibits E or F, is pertinent to the case. However, on the face of it, the relevancy of Exhibit F to the '611 patent has nothing whatsoever to do with the relevancy of Exhibit E to the '395 patent.

We do not wish to belabor the point, but it is respectfully urged that this Court read pages 49 to 52 very carefully to get the full effect of Appellant's specious reasoning from a false premise to a conclusion favorable to his case, but directly contrary to the facts and law of the case.

Claim 1 of the '395 Patent Is Invalid for Want of Novelty and Invention Over Parker No. 1,965,052 and Is Limited Thereby to the Check Valve 79 Shown in Figure 6 of the '395 Patent.

Parker [R. 325] discloses a complete safety apparatus for steam boilers whereby as needed, feed water is supplied to the boiler, a whistle blows and the fuel is shut off, all responsive to lowering of water in the boiler. However, since claim 1 of the '395 patent deals solely with the Blanchard *fuel valve* assembly, we will only discuss this portion of Parker, since it is all that is material. It is to be noted, however, in passing, that Parker in addition to shutting off the fuel when the boiler water gets dangerously low, also shuts off the fuel if the pressure in the boiler becomes too high from any cause.

Parker shows a conventional steam boiler 1 having a gas burner 2 supplied by a fuel conduit 3 in which there is a valve 34 yieldingly held open by weight 35. The

fuel valve 34 is closed by an arm 33 which is connected to the piston rod of a piston 39 in cylinder 31.

A water column 8 is connected to the boiler 1 and has a float 47 mounted on the inner end of a lever 46. The outer end of lever 46 is connected to three vertical rods or links 49, 50 and 51 which operate steam valves to control the feed water pump, alarm whistle and fuel valve 34.

When the float 47 drops (see Fig. 1) the outer end 48 of its lever raises the link 41, thus opening valve 27, permitting steam to flow from the top of the water column 8 down through the vertical pipe 32 (at the right of column 8), horizontal pipe 25, valve 27, T 26 and check valve 30 to the upper end of cylinder 31. This forces the piston 39 downwardly against the yielding force of weight 35 to shut the fuel valve 34. The pressure on the piston 39 is subsequently released by the manually controlled relief valve or pet cock in the upper end of the fuel valve cylinder 31.

Parker also provides a check valve 29 at the top of his water column 8 so that when steam pressure becomes excessive the valve 29 opens to permit steam to flow down through the vertical pipe at the left of column 8 (see Fig. 1), directly to the cylinder 31 to shut the fuel valve 34.

It is thus seen that Parker provides two steam circuits for shutting off the fuel valve 34 in response to dangerous boiler conditions, one through check valve 29 and the other through check valve 30. In each instance the fluid in the fuel valve cylinder 31 is trapped and holds the fuel valve closed until the relief valve in the top of the cylinder 31 is manually opened.

It is thus seen that Parker discloses each and every element of Appellant's '395 patent if we adopt Appellant's

contention that diaphragms and pistons are equivalent in this art.

This complete anticipation is readily apparent if we outline claim 1 as follows, indicating by numbers from Parkers' drawings, where each element is found in the Parker patent.

CLAIM 1 ('395).

In a safety apparatus for boilers (Parker's general assembly)

- (a) a fuel supply conduit (fuel conduit 3)
- (b) a valve in said conduit (fuel valve 34)
- (c) means for yieldingly holding said valve open (weight 35)
- (d) a compartment (cylinder 31)
- (e) a diaphragm (piston 39 with its sealing ring is the full equivalent of Blanchard's diaphragm)
 - (1) a protective liquid for said diaphragm in said compartment (the water of condensation in the upper end of cylinder 31, formed as described in the Blanchard patent)
 - (2) connections between said diaphragm and valve (the piston rod extending downwardly from piston 39 to lever 33 connected to fuel valve 34)
- (f) means for supplying fluid under pressure to said compartment for flexing said diaphragm and moving said valve to closed position (the left-hand pipe without number in Fig. 1 of Parker leading from check valve 29 down to cylinder 31; and also pipes 22, 25, valve 27, T 26, check valve 30, to cylinder 31)

(g) and manually operable means for relieving the fluid pressure on said diaphragm (the pet cock without number in the upper end of Parker's cylinder 31).

It is thus seen that Parker alone shows *each and every* element of Blanchard's claim 1, the elements being arranged in exactly the same relationship and performing the same function in exactly the same way.

The only possible way to avoid having claim 1 anticipated by Parker is to hold that a piston is not the equivalent of a diaphragm. However, from the Appellees' standpoint it makes no difference which way the Court holds because if the Parker piston is not the equivalent of Blanchard's diaphragm, then Appellees' piston of course is likewise not the equivalent, and the claim is not infringed.

It is thus seen that claim 1 of the '395 patent is anticipated by Parker, even though limited to include the check valve 79 as construed by the trial court herein. It is submitted that the trial court in addition to holding claim 1 not infringed, should have also held this claim to be invalid over the Parker patent.

In an attempt to meet the complete showing of the Parker patent the Appellant has set up a straw man and then tried to knock him down.

The Appellant contends that the element in claim 1

“means for supplying fluid under pressure to the compartment”

should be construed to include the plural needle valve and whistle assembly shown but not claimed in his '395 patent and attempts to distinguish from Parker by stating that

Parker does not have this "master control unit" and therefore does not meet claim 1.

However, such tactics can avail the Appellant nothing, for as previously mentioned, there is no suggestion whatsoever in the claim that it was meant to cover any such master control unit (claimed in '611) and furthermore, claims to this concept of first having a whistle blow and then shutting off the fuel were consistently rejected by the Patent Office and the Appellant is barred by file wrapper estoppel from now urging such an interpretation of claim 1.

If, as the Appellant urges, diaphragms and pistons are equivalents of each other, then Parker fully anticipates his claim of the '395 patent.

Finding No. 7 [R. 20] states specifically that the "means for supplying fluid under pressure" is the conduit 25a shown in Figs. 1 and 6 of the '395 patent. To this, the Appellant asks this Court to add, not just a control valve, but a particular kind of valve, a whistle and all the equipment to operate them in a particular way. Such a request is improper on its face.

As the trial court said in its memorandum opinion, it is the claims that are infringed, not the specification. Claims to the broad idea of combining the fuel valve of the '395 patent with the needle valves of the '611 patent were denied to Appellant by the Patent Office as lacking novelty and invention. It would therefore be contrary to the law of this Circuit and every Circuit for this Court to now re-write the claims in either of these two patents to give to the Appellant a monopoly on what has been in the public domain since long prior to Appellant's entry into this art.

4. Claim 1 of the '395 Patent Is Anticipated by the Prior Patent to House No. 521,166 Unless Limited to the Check Valve 79 as Was Done by the Trial Court. As so Limited It Is Admittedly Not Infringed.

The patent to House [R. 331] was the principal reference relied upon by the Examiner in rejecting claim 14 of Blanchard's application which became claim 1 of his '395 patent. The Examiner consistently held that House fully met claim 14. That the Examiner was correct and the Appeal Board wrong in subsequently allowing claim 14 as claim 1 of the '395 patent is abundantly clear from an inspection of the file wrapper, since it is quite apparent therein that the Appeal Board was under a clear misapprehension of the facts pursuant to definitely misleading statements in Blanchard's appeal brief.

The House patent shows a conventional boiler provided with a water column R connected thereto. A slide valve U is operated by a float S so that as the float is lowered, the valve U opens a port V to the feed water pump to supply water to the boiler. If for any reason the water continues to drop, slide valve U opens the second port V', permitting steam to pass down through pipe V3 to a cylinder W'. A piston W with a spring W2 in cylinder W' yieldingly holds the fuel valve X normally open by means of a connecting rod and link.

Cylinder W' is also provided with a relief valve W3 similar in location and function to that of Blanchard. As in Blanchard the condensed steam will fill the left end of the cylinder W' back up into the line V3 for a substantial distance. Periodic opening of relief valve W3 is therefore necessary to draw off this water and when desired, valve W3 can be opened to release the pressure on the piston

and permit the spring to open the valve in the same manner as Blanchard.

The only difference between House and Blanchard is that whereas Blanchard provides small bleed vents up near his control valve, House left his relief valve W1 slightly open during operation for the same purpose. House does not mention a check valve *but neither does Blanchard in his claim 1*, and consequently, unless Blanchard is construed to include the check valve 79 as found by the trial court, his claim is anticipated by House. It is to be particularly noted that claim 14 (patent claim 1) at no time included a check valve or other non-return means.

However, in his Brief on the first appeal Blanchard stated on page 42 of the '395 file wrapper that his structure was superior to that of House because

“the *check valve* holds the closing fluid in the head of the fuel cut-off valve until it is re-set by hand by releasing the fluid through the relief valve 78.”

Later in the second appeal, Blanchard's attorney took advantage of the careless statement of the Examiner on appeal and stated with respect to claim 14 as follows:

“In Applicant's construction the valve when once closed will not be allowed to open again *due to the check valve 79* until the hand operated valve 78 is opened to relieve the pressure above the diaphragm. *This is included as an element in this claim.*”

From the Appeal Board's decision appearing at the bottom of page 92 of the file wrapper, it is obvious that the Board did not read claim 14, but relied upon Applicant's Brief which stated unequivocally that the check valve 79 was an element of said claim. The Appeal Board

obviously had in mind when it made its decision the representation of Blanchard that claim 14 was allowable because it had a check valve therein which was not shown in the House patent.

It is clear therefore, that unless claim 1 is limited as specifically found by the trial court, and as said by Blanchard on his appeal it was, to include check valve 79, it clearly reads on the prior patent to House just as it reads on the prior patent to Parker.

The pertinency of the House patent and the clear mistake of the Board of Appeals was argued before the trial court and formed the principal basis for Finding No. 4 which limits claim 1 to the check valve 79 and consequently renders it admittedly not infringed.

5. The Blanchard '395 Patent Is Also Invalid for Lack of Invention Over the Other Prior Art Patents as Follows.

SUTHERLAND [R. 335] shows a float controlled needle valve which when the boiler water is too high, opens to permit steam to pass through lines 33 and 32 into the cylinder 19 to move the piston 18 downwardly to close the normally open valve 10 in the feed water line. The piston of Sutherland is identical with that used by Appellees and is operated by a float controlled needle valve in the same manner as Appellees'. Claim 1 is clearly invalid on Sutherland in view of the conventional relief valves shown by House and Parker.

The HORRIDGE [R. 339] device has a piston 15 movable in a cylinder 20 and normally held in its upper position by spring 23 to maintain a steam valve 8 in open position. When the pressure in the line from the feed water

pump becomes excessive the piston is depressed, closing the valve and thereby shutting off the steam to the feed water pump. Here again we have an apparatus which is structurally the same as Appellees' accused fuel valve assembly except for the conventional relief valve of Parker and House.

With respect to Appellant's discussion of the Sutherland and Horridge patents, Appellant states that one of the allegedly distinguishing features between Blanchard and Sutherland and Horridge is that the reference patents do not have a "master control unit" to actuate a fuel shut-off valve *after the level of the water* in the boiler has receded from the point *where a whistle* alarm has been sounded. Here again, as he does all through his Brief, Appellant asks the Court to read *two needle valves and a whistle* into the single element,

"means for supplying fluid under pressure to said compartment."

Appellant is clearly estopped by his file wrapper from properly making such a request.

The patents to SPILLER [R. 343] and FERRARI [R. 347] are cited as further illustrations of piston operated valves similar to Appellees'. It is of course immaterial whether the valve is in a fuel line or in a steam line. Both of these valves are held normally open by springs and are closed by fluid forced against the piston head to move it and the valve downwardly.

With respect to Spiller it is to be noted that Appellant's principal defense is that Spiller has no

"means for supplying fluid under pressure to his cylinder"

because he does not have a *plurality of valves and a whistle*.

This *needle valve and whistle defense* is raised on almost all of the prior art patents and has as little pertinency to one as to another. Appellant cannot now seek an interpretation of claim 1 which makes it coextensive with previously cancelled claims.

The WILLIAMS [R. 355], FULTON [R. 359], DOBLE [R. 367] and STANLEY [R. 373] patents are cited to show *diaphragm operated valves for boiler control* which are practically identical with the valve assembly of Appellant. Williams shows each and every element of Blanchard's claim 1 except the manually operable relief valve. Fulton shows a diaphragm operated valve which is the full equivalent of the Blanchard valve, while Doble and Stanley show boiler control apparatuses which were primarily designed for the steam automobiles bearing the names of the respective inventors. Each of these latter patents shows all of the elements of claim 1 of Blanchard except the manual relief valve. While these patents do not anticipate, there certainly was no invention in the addition of a conventional relieve valve to their structures.

It is therefore submitted that claim 1 of the Blanchard '395 patent *is invalid for lack of invention* over any of the described patents, particularly if as urged by Plaintiff, we ignore the check valve.

SUMMARY OF DEFENSES AGAINST THE '395 PATENT:

From the foregoing it is seen that the Appellees have a number of defenses to the '395 patent, each complete within itself as follows:

1. The Appellees' present fuel valve assembly being identical with that manufactured by Appellees in

1932, more than three years prior to the Appellant's earliest date, cannot possibly infringe the Appellant's '395 patent. This defense is thoroughly documented by the drawings E2 and H, both dated prior to Appellant's first application date, and the undisputed testimony of Harvill, Robson, Brown, Thornton and Dolarheid, all of whom corroborated the testimony of Pinkerton, and all of whose testimony was deemed by the trial court to be clear and convincing beyond a reasonable doubt. If the '395 patent reads on Appellees' fuel valve assembly, then the patent is invalid under the rule that "That which infringes if later, anticipates if earlier," since Appellees' structure antedates Appellant's invention.

2. There can be no infringement of claim 1 of the '395 patent because in order to sustain its validity, it must be construed as done by the trial court, to include the check valve 79 which is totally lacking in the Appellees' device. If not so construed, then the claim is clearly invalid.
3. Even when construed as by the trial court, claim 1 is invalid over the Parker patent for lack of novelty and invention.
4. Claim 1 unless limited to a check valve is anticipated by House, and would have been rejected by the Appeal Board if it had not been misled by Appellant's Appeal Brief in the Patent Office.
5. Claim 1 is invalid for lack of invention over either Parker or House taken in connection with the other prior patents of record.

D.

The '611 Patent.

In urging that his '611 patent is a pioneer and therefore entitled to a broad range of equivalents, the Appellant again ignores the clear showings of the prior art, and ignores the specific finding of the lower court [Finding No. 13, R. 23] to the effect that:

“Each of the claims in suit calls for and is limited to a single cross-pin operating a plurality of aligned needle valves, each with a slot in its valve stem, the slots being of different size and the valves being operated by a float lever. Each of the claims must be strictly limited to the precise structure illustrated in the patent, and *as so limited* is valid.”

For example, Blanchard stipulated at the trial that the Reliance High-Low alarm valve assembly, Appellees' Exhibit A illustrated in the Reliance catalogue sheet Exhibit A1 [R. 313, 314] was well known prior to 1930. Appellant also testified that prior to making his alleged invention of the patent in suit he had sold Reliance valves for a number of years.

Even a cursory comparison of Appellant's structure in the '611 patent with the old Reliance High-Low alarm valve structure shows that Appellant's plug and needle valves are merely Chinese copies of the Reliance plug and needle valves, Exhibits A and A1. What Blanchard very evidently did after he left Reliance was to take the Reliance High-Low valve structure, throw away one float and hook the two valves on the same pin so that they would open sequentially in response to movement of the remaining float.

In original claim 1 of his application as filed, Appellant tried to claim broadly the idea of a plurality of valves

sequentially opened by movement of a float. However, this claim was rejected by the Patent Office and cancelled by Appellant who then amended to specify his particular structure comprising a plurality of aligned needle valves having slots of different sizes in their ends, *all mounted on the same pin*. Appellant is now estopped to try and expand these claims to include conventional lost motion linkages such as shown by the prior art and employed by the Appellees.

Realizing this, the Appellant in order to try and make his invention sound important, adds to it the whistle and fuel valve disclosed in his '395 patent, and then cries "pioneer invention."

1. Unless Strictly Limited to the Disclosure of the Specification, the Claims of the '611 Patent Are Invalid.

The Plaintiff is again clearly on the horns of a dilemma, for a construction of the '611 claims broad enough to find infringement herein causes the claims to read squarely on the prior art. Conversely, a construction of the claims limited to what the Patent Office obviously intended them to cover finds no infringement in the Appellees' device. Consequently the Appellant again shuts his eyes to the prior art and urges that he has a pioneer patent and therefore is entitled to a construction broad enough to include Appellees' device.

The three claims in suit all recite the same elements, the only differences between the claims being in the specific language used. Claim 1 is typical and can be conveniently set forth as follows:

(a, b, c) A housing, a plurality of outlet passages through said housing, a valve in each of said passages,

- (d) said valve *having slots of varying lengths in one end* to determine the order in which they are opened,
- (e) *a pin through said slots,*
- (f. g, h) operated by a lever fulcrumed within said housing, a float on the end of said lever, whereby said valves are opened one at a time in sequence responsive to the downward movement of said float.

A plurality of needle valves arranged in a row and operated in sequence by a float was old long prior to Appellant and the only possible novelty available in these claims is the idea of providing aligned slots of different lengths in the valves through which a single cross-pin passes to operate all of the valves *without using additional linkage.*

If the Appellant made any invention, which is extremely doubtful, it must reside in the specific pin and slot arrangement set forth in elements (d) and (e) above. This is clearly apparent from an inspection of the file wrapper of the '611 patent wherein it is seen that claim 1 as originally filed was not allowed until amended by inserting the limitation

“said valves *having slots of varying lengths in one end* to determine the order in which they are opened, *a pin through said slots*”

If the above language is given a normal interpretation, claim 1, and by the same token claims 2 and 5 of the '611 patent, may be valid, although clearly not infringed by Appellees' structure.

However, the Appellant in order to include the Appellees' valve mechanism in his claims has expanded the claims to the point where they also read on the prior art

and hence are invalid. This same broad construction was urged upon the trial court below but was not followed by the Court who instead adopted a limited construction for the claims and consequently held them valid but not infringed.

The judgment of the lower court can be affirmed upon the grounds given, or this Court may within its sound discretion, adopt Appellant's interpretation of the '611 claims and hold them invalid over the prior art.

The Appellant as usual is trying to have his cake and eat it too. When discussing the prior art he adopts a narrow construction for his claims in pointing out the minute differences between his structure and those that went before. However, in discussing the accused device and trying to show infringement thereof, the Appellant throws his previous interpretation to the winds and urges that he has a pioneer patent that covers all structures for accomplishing his alleged new result. This is contrary to fundamental law and logic. The Plaintiff must pick a single construction for his claims and stick to it.

As was clearly stated by Circuit Judge Stephens in the case of *Wire Tie Machinery Company v. Pacific Box Corp.* (C. C. A. 9), 107 F. 2d 54, 43 USPQ 128:

"Appellant cannot be permitted to construe his claims with reference to his drawings and specification in order to escape invalidity, and then in the next breath seek to disregard the drawings and the specifications in order to spell infringement."

This same rule was stated in somewhat different language by the Seventh Circuit Court of Appeals in the case of *Emory Industries, Inc. v. Schumann* (C. C. A. 7), 111 F. 2d 209, 45 USPQ 12, wherein the Court said:

“It is impossible for us to allow the claims to be supported and made more definite and certain by reference to the specification for the purpose of upholding their validity, and at the same time eliminate the specification restrictions in order to include the Defendants as infringers.

“The decree is reversed with directions to dismiss the complaint.”

The foregoing cases accurately describe and condemn what the Appellant has done in this case.

2. The Appellees' 1932 Structure.

As has already been mentioned, the Reliance high-low water alarms were on the market long before either Appellant or Appellees herein entered the field of boiler water control. Since the Appellee Pinkerton was manufacturing and selling a float controlled boiler alarm and fuel shut-off prior to the advent of Appellant into the field, we shall first consider this early structure of Appellees as part of the prior art before we consider the Appellant's charges of infringement.

As the record shows, the Appellee Pinkerton after some twelve years in oil field work started his own business in 1927 manufacturing and selling boiler feed water regulators. These regulators are still being sold by Appellees.

In 1931 Mr. Pinkerton started to develop the alarm and fuel shut-off hereinbefore referred to as the 1932 structure. This apparatus consisted of two main parts, a fuel

shut-off valve exemplified by Exhibit E previously discussed in connection with the '395 patent, and an alarm body and needle valve assembly exemplified by Exhibit F in evidence.

This equipment comprising Exhibits E and F has been manufactured and sold continuously from 1932 to date, the first installation thereof being at the Seal Beach lease of the Continental Oil Company in the latter part of 1932 or the early part of 1933.

Exhibits F1 and F2 [R. 318, 319] are photographs of the 1932 alarm body, Exhibit F, and Exhibits F3, F4 and F5 [R. 320, 321, 322] are drawings thereof made in 1934 prior to Blanchard's earliest date in this case. The internal construction of Exhibit F is best shown in the drawing Exhibit O in evidence. [R. 462.]

Referring particularly to the photograph F2 and the drawings Exhibit O, the numeral 6 on the latter designates a cap or flange on top of the alarm body into which an apertured plug 13 is screwed which carries a needle valve 15. The cap 6 has two outlets leading to pipes 11 and 12 which go to an alarm whistle and fuel shut-off valve respectively. The needle valve 15 is pivotally connected by a pin 50 to a float lever arm 20 which is in turn fulcrumed on a stationary pin 24. The other end of the arm 20 is pivotally connected to a float 23.

When the water in the boiler is at normal level the needle valve 15 is closed, but when the water level drops, the needle valve opens as illustrated in Figure 11 of Ex-

hibit O, thus permitting steam to pass through the needle valve aperture and out through the pipes 11 and 12 to blow the whistle and operate the fuel shut-off valve Exhibit E.

This type of apparatus proved entirely satisfactory for low pressure boilers, particularly on leases where the operator might at times be a mile or so distant from the boilers. The main thing was to shut down the boiler before serious damage was done and notify the operator that the boiler had been shut down.

As the drilling of wells was carried to greater depths and higher pressures were demanded of the boilers, shut-downs became more objectionable and expensive and it was desirable to notify the fireman before the fuel was shut off so as to give him a chance to fix the trouble if possible. To meet this need the Appellee Pinkerton in 1937, prior to the sale of any of Appellant's alarms in California, modified his 1932 structure to delay the action of the fuel shut-off valve until after the alarm whistle had blown.

This he accomplished by adding another needle valve in the manner taught by Reliance [R. 313] and connecting this additional needle valve to his float lever by a conventional lost motion linkage, many types of which are shown in the prior art patents to be later discussed.

As the trial court found [Finding 20, R. 24],

“the accused devices are merely normal variations of the Reliance valve and the early Pinkerton structure, open to any member of the general public.”

3. Appellees' Accused Needle Valve Structure.

The Appellees' accused structure is best shown in Exhibit D [R. 315] wherein it is seen that the device comprises a flange 6 provided with fluid passages 8 and 9 having valve seats 13 therein. A valve 15 slidable in passage 8 is pivotally connected at its rear end by means of a pin 50 to the end of float arm 20 which is operated by a float 33. This much of the present structure is *exactly the same* as in the 1932 apparatus. The parts are the same and the operation is the same—when the float goes down the valve 15 is pulled rearwardly from its seat, permitting steam to pass through the passage 8 and out through the pipe 11 to blow an alarm whistle.

A second valve 16, slidable in passage 9, has a loose link in the form of a ring 52 pivotally attached to its rear end by a pin 51, the ring being pivotally connected by a pin 24 to the flange body.

A pin 60 on lever 20 is positioned so that it extends through ring 52 a little above the middle thereof when the valve 16 is fully closed as seen in Figs. 1 and 2 of Exhibit D.

As the float drops to the position shown in Figs. 3 and 4, the valve 15 is first opened and as the pin 60 moves downwardly it engages the lower portion of ring 52, moving it downwardly about its pivot point 24, thus pulling the valve 16 off its seat and permitting steam to pass out through the passage 9 and pipe 12. When water is introduced into the chamber and the float rises, the steam pressure closes the valves.

As Mr. Pinkerton testified [R. 253, 254], and as apparent from the exhibits, there are many advantages to this type of structure over the type of construction illustrated

in the '611 patent. By using an extra lost motion link it is possible to very loosely fit all parts and thereby minimize binding or freezing from corrosion, whereas, when a single pin is passed through slots in all of the valve stems as in Blanchard, it is necessary to more accurately adjust the parts and corrosion or scaling of one valve stem renders the entire device inoperative. By employing a conventional lost motion linkage the Appellees secure freedom of movement not possible in the Blanchard structure.

4. There Is No Infringement of the '611 Patent.

The single feature of novelty of the '611 patent is set forth in the claims in issue as follows:

Claim 1—"said valves *having slots* of varying lengths *in one end* to determine the order in which they are opened, *a pin through said slots* operated by a lever fulcrumed within said housing,"

Claim 2—"a *cross-pin* on said lever, *stems* on said valves *having openings therein to receive said cross-pin* said valve stem openings being of varying lengths,"

Claim 5—"a *pin* carried by said lever, *stems* on said valves *having openings therein through which said pin extends*, the opening in each stem being of different lengths from the others."

Unless the above elements of the Blanchard claims can be found in the Pinkerton structure there can be no infringement unless a broad application is made of the doctrine of equivalents. As will be seen later, no expansion of the claims is possible without making them read on numerous prior patents and therefore invalid.

Examining the claims it will be seen that each of them speaks of "*a* pin." The claims do not speak of "pins" in the plural, and the specification does not show "pins" in the plural. The '611 patent shows only the concept of passing the *same* pin through the aligned slots of a plurality of valves arranged side by side.

Furthermore, it is noted that the slots are all specified as being *in the valves or valve stems*. That the Appellant and Examiner intended exactly this structure and no more is evidenced from the fact that in claim 2 the pin is mentioned a second time as "*said* cross-pin" and in claim 5 it is mentioned the second time as "*said* pin."

Appellant concedes that Appellees do not have slots of different size in their valve stems and that they do not have a common pin extending through slots in said valves or stems. Appellant attempts to get around this obvious distinction by saying that Appellees' separate ring 52 and separate pin 60 are equivalents of the claimed structure. However, since similar linkages used for the same purpose are shown in the prior art, the claims become invalid if construed as requested by Appellant.

Appellant's claim in this regard that Appellees are merely duplicating his parts is untenable because by using a linkage of several parts instead of Appellant's structure, the Appellees are doing what was taught by the prior art long before Blanchard entered the field.

The trial court was correct when it found that "the Defendants' structures uses *separate* pins located at *two different places* to operate two *separate* valves in a manner different from that disclosed and claimed in said '611 patent"; that the pin and ring lost motion mechanism of Appellees was "entirely dissimilar from those shown in the '611 patent." [R. 24.]

The pin 60 in Exhibit D does not engage any portion of the valve stem 16, but on the contrary, engages and operates an entirely separate and distinct link 52 which is in turn pivotally connected to the valve 16.

It is true that Appellees' device accomplishes the same result as that accomplished by Appellant, but it is equally true that this result is accomplished by an *entirely different* structure in an *entirely different* way.

It is submitted that even without regard to the prior art there could be no infringement of the '611 claims by the Appellees' structure.

Additionally, when we consider Appellees' own 1932 structure and the Reliance valve which were part of the prior art and the various plural valves and lost motion mechanisms for boiler control shown in the prior art patents now to be discussed, it becomes further evident that the findings of the trial court were correct and should be sustained.

5. The Prior Art Patents Pertinent to the '611 Patent.

BALDWIN No. 796,982 [R. 389]:

Referring to Fig. 1 of Baldwin it is seen that he has a water column C connected to a steam boiler, an alarm whistle G mounted thereon, and a steam line I and fitting 1¹ running to a feed water supply valve B.

Referring to Fig. 4, it is seen that Baldwin has a housing or plug mounted in the side of his water column C which is provided with three passages, in each of which is located a needle valve. The upper two valves C19 and C22 operate the whistle G while the lower valve C3 operates the feed water pump valve B.

The valve C3 has a slot C6 in its stem in which a pin C8, carried by the float lever C1-C4, slides to open valve C3 when the float C rises. The upper valves C19 and C22 are connected to the float lever by a lost motion pin and slot linkage. As the float rises, it first opens needle valve C3 and then opens needle valve C19.

We see therefore that as in Appellees' structure, the first valve to be opened is direct-connected to the float lever, and the second valve to be opened is operated by a separate link and pin arrangement similar to that used by Appellees. Consequently, if we construe the '611 claims as urged by the appellant so as to include the ring and pin linkage of Appellees, the claims are invalid as reading squarely on the Baldwin structure.

In the five pages that Appellant devotes to Baldwin in his Brief, he seeks to distinguish Baldwin by reason of the fact that the Baldwin needle valves operate sequentially upon *upward* movement of the float lever rather than *downward* movement thereof. However, this is an immaterial functional difference and the Appellant would be the first to claim that his patent would not be avoided by turning his structure upside down.

The other point urged by Appellant is that in Baldwin the second valve operates the whistle instead of the first valve. However, this argument is of no avail because there is nothing in the claims of the '611 patent about whistles, fuel shut-off valves, feed water valves, or any other apparatus to be operated by the claimed needle valve assembly. The claims do not even recite that the apparatus is for use in a boiler, and certainly there is no suggestion in any of the claims as to what the various outlet passages are connected to.

Again we have the Appellant setting up a straw man so that he will have something to knock down when discussing the prior art. The Appellant asks this Court to read into the '611 claims a large part of the disclosure of the '395 patent so that he can find some differences between the '611 claims and the prior art. The Appellant has gone even farther here than he did on the '395 patent since the elements he wishes the Court to read into the '611 claims are not even disclosed in the '611 patent.

The plain and simple fact of the matter is that if we construe these claims broadly enough to be infringed, they read fairly and squarely upon the Baldwin patent, which if turned upside down is exactly the Pinkerton structure insofar as the Appellant's claims are concerned. The only way that the '611 patent can be held valid is by limiting it as was done by the trial court.

WRIGHT No. 668,302 [R. 399]:

This patent shows a housing having a central float chamber a^1 , an inlet port a^2 and an outlet duct a^3 . A valve housing e is screwed into and depends from the cover c of the chamber and has three aligned passages therein provided with needle valves, f , g and h having stems f^1 , g^1 and h^1 respectively. The valve stems are connected at their lower ends to links or levers f^2 , g^2 and h^2 , respectively, all of which levers are pivotally mounted on a pin M in a manner similar to the Reliance valve Exhibit A.

A float b has a slotted stem b^1 extending downwardly therefrom which is provided with three pins b^3 , b^5 , and b^7 . The center lever or link f^2 is connected by a slot in its free end to pin b^3 on the float stem b^1 while the levers f^2 and g^2 are positioned to be engaged by the pins b^7 and b^5 , respectively (see Fig. 3). The needle valves are

normally closed and as the float rises it first opens center valve f and then valves g and h sequentially as their levers are engaged by their respective pins on the float stem.

If we adopt Plaintiff's theory that the valve stems can be in two or more parts, and that the respective valves can be operated by separate pins as is done by Appellees, we find that Wright is a complete anticipation of the Blanchard '611 patent. As a matter of fact, if we merely cut off one of Wright's levers f², g² or h² and put a pin on the remaining lever, we would have the Pinkerton structure exactly.

Since the Wright patent was a file wrapper reference over which Blanchard's claims were allowed it is obvious that the Examiner was not interpreting the Blanchard claims in the manner now contended for by Appellant. It would seem self-evident that the Examiner having the Wright patent in front of him while considering the Blanchard claims, must have taken the Blanchard claims at their face value and assumed that when Blanchard said "slots in said valve stems" and "a pin through said slots" he meant just that, to-wit, that his claims thus distinguished over the art which had separate pins operating separate valves through intermediate linkages in the manner used by Pinkerton.

On page 37 of his Brief Appellant purports to state four reasons why his '611 patent represents an advance over Wright, but analyzing these paragraphs numbered 1 to 4 we see that they are just different statements of one point, to-wit, that according to Appellant, Wright does not have a plurality of outlet passages as called for in the claim. The only justification given for this novel

theory is that because all of these passages open into a single large outlet pipe that they are not passages. On the face of it, Wright provides three separate passages, valve seats and needle valves in exactly the same way that Appellant provides them. Nothing whatsoever is said in the Blanchard claims indicating whether or not the separate passages lead to separate devices or any devices. For Appellant to argue that they do, is a plain admission that Wright meets all the other elements of his claims.

The fact remains, that if the '611 claims are expanded sufficiently to include the Appellees' structure, then by that same interpretation they read on Wright as well as Baldwin.

SINGLETON No. 7,767 [R. 409]:

This patent is an excellent illustration of the antiquity of Appellant's idea of sequentially opening several needle valves in response to continuous movement by a float in a boiler. In some respects the Singleton patent is much closer to the Appellant's structure than those previously discussed.

Singleton shows a valve box C having three passages therethrough in each of which a needle valve is located. These needle valves are aligned horizontally in exactly the same manner as Blanchard's. The center needle valve G¹ has an enlarged slot S in its stem and the outer needle valves G are provided with heads g on their stems. The slotted stem of center valve G¹ has a small upstanding lug 3 thereon.

A float D is connected to a lever L which is pivoted at its other end to a pin f and is provided with a pin L¹

which extends up through the slot S. The stem of valve G^1 is also provided with horizontal pins e^1 adapted to engage the valve heads g .

When the float D drops, the float lever L moves downwardly, causing its pin L^1 to rotate to the right about pin f in Fig. 1, thus engaging the lug e and pulling the valve G^1 to open position. Further downward movement of the float and its arm L causes the pins e^1 to engage the heads g on the valves G , thus causing these valves to open.

It is thus seen that Singleton provides a multiple valve structural for boiler control comprising a housing having three passages therein, each provided with a needle valve exactly as in the Blanchard structure. One of the valves (the center one) has a slot *in its valve stem* which is engaged by pin L^1 to open the valve G^1 . Lost motion mechanism in the form of heads g and pins e^1 cause the valves G to be opened after the first valve has been opened.

Here again we find an old prior art structure which is almost a duplicate of the Appellees' structure herein. Consequently, if the Appellant's '611 claims are to be expanded sufficiently to include the Appellees' structure, then of necessity they must also include and read upon the Singleton structure and therefore be invalid.

This patent has not been discussed by Appellant in his Brief before this Court, but in his Brief below the Appellant urged the same fallacious reasoning as previously discussed with respect to the Wright patent, to-wit, that Singleton does not show a plurality of outlet passages. This is erroneous on its face, since Singleton of course has three separate passages and each one is an outlet from the boiler. Furthermore, as previously mentioned, there is nothing in the Blanchard claims that says anything

about where the passages must lead. This patent, along with the patents to Humphrey and Wyatt were urged upon the trial court and were considered by the Court and mentioned in its opinion. Appellant therefore had notice that Appellee would urge these patents in this proceeding.

HUMPHREY No. 796,516 [R. 413]:

This patent is a file wrapper reference and if the Appellant's claims are given a normal interpretation they are not anticipated by Humphrey. However, if the claims are expanded as requested by Appellant, they also read on Humphrey and are therefore invalid.

Referring to Figs. 1 and 2 of Humphrey it is seen that like Blanchard he provides three needle valves in horizontal alignment which are sequentially opened by movement of a float. Each of the needle valves K is provided with a stem M, said stems being provided with downwardly extending arms k, o and p, respectively, which are referred to in the specification as vertical levers. These levers are all pivoted on a bracket P so that as the levers are rotated about P they will consecutively open the needle valves. The float arm j is securely fastened to the center lever k so that the center valve K is immediately responsive to movement of the float in the same manner as one of the valves of Blanchard.

The float arm j is also provided with a pair of loops, a small loop l and a large loop m which encircle the valve levers o and p, respectively. The loops being of different size, movement of the float arm j will cause the loops to successively engage their respective levers so that after the center valve k is opened further movement of the float sequentially opens the other valves.

Either one of the loops of Humphrey is the full equivalent of the ring 52 of Pinkerton and the levers k, o and p are the full equivalent of Pinkerton's pin. In other words, if the '611 claims are construed to include a first valve direct connected to a float lever, and a second valve indirectly connected thereto by a pin and link as urged by Appellant, then the claims read on Humphrey as well as on Pinkerton.

WYATT No. 105,289 [R. 419]:

This patent also shows the antiquity of delayed action mechanisms for sequentially opening a pair of valves operated by a float and lever. As the float F drops it rotates lever c' which has an extension d thereon which engages valve C, pushing it to the left to open it. Further downward movement of the float F causes pin h carried by the float lever to open slide valve H, thus permitting steam to flow to the pipe G to blow a whistle. The opening of the first valve passes steam to the feed water pump.

There being nothing in the Blanchard claims about whether his valves are pulled or pushed open, or where or to what his valve passages lead, or what they are supposed to operate, we see again a prior art patent which anticipates the Blanchard claims unless they are limited to his particular pin and slot arrangement as done by the trial court.

SUMMARY WITH RESPECT TO THE '611 PATENT:

From a consideration of the prior art as exemplified by the Reliance high-low water alarm, the Appellees' old 1932 structure and the prior patents to Baldwin, Wright, Singleton, Humphrey and Wyatt, it is readily apparent that there is more than ample evidence in the record of this

case to sustain the findings of the lower court that the Appellees' structure is not the equivalent of Appellant's and that the Appellant's structure must be limited in view of the prior art to his specific construction of a single pin through a plurality of slots in the stem of the aligned needle valves.

There is also abundant evidence in the record that if the claims of the '611 patent are not so limited, then they are anticipated by the prior art references.

It is Appellees' position additionally that even giving the claims the benefit of the narrow interpretation placed upon them by the trial court, that the claims although not void for lack of novelty, are void for want of invention over the prior art.

It is not seen how the Appellant's contribution to the old art of sequentially operating a plurality of needle valves can rise to the dignity of invention in view of the many and varied previous mechanisms in the public domain for this purpose.

While it is true that the mere affirmance of the lower court's decision upon the grounds expressed by the lower court will dispose of this case as between the parties, it is believed that patents of this type should not, as a matter of public policy be allowed to remain at large to plague other workers in the art who are entitled to make reasonable variations in the prior art devices in the public domain.

It is submitted therefore that in addition to holding the '611 claims not to be infringed, this Court should hold them invalid for lack of invention.

E.

Conclusion.

The judgment of the trial court dismissing the complaint herein should be affirmed:

1. On the ground of non-infringement, and
2. On the ground of invalidity of both patents in suit.

Respectfully submitted,

FULWIDER & MATTINGLY,

By ROBERT W. FULWIDER,

Attorneys for Appellees.

APPENDIX.

Points and Authorities.

LAW POINT 1.

The Claims Measure the Invention.

(a) “* * * the claims measure the invention. They may be explained and illustrated by the description. They cannot be enlarged by it.”

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 419.

(b) “The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute.”

Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 510.

(c) “In view of the statute, the practice of the Patent Office, and the decisions of this Court, we think that the scope of Letters Patent should be limited to the invention covered by the claim, and that though the claim may be illustrated, it cannot be enlarged by the language, used in other parts of the specification.”

Railroad Co. v. Mellon, 104 U. S. 112, 118.

(d) "The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it."

McClain v. Ortmyer, 141 U. S. 419, 432, quoted with approval in *Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co.*, 1 F. 2d 573, 679 (C. C. A. 9).

LAW POINT 2.

The Claims Must Be Definite, Unambiguous and Read on the Patentee's Own Structure.

(a) "The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

White v. Dunbar, 119 U. S. 47, 51-52.

(b) "The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it leaves no excuse for ambiguous language or vague descriptions. The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights. The genius of the inventor should not be restrained by vague and indefinite descriptions of claims in existing patents, from the salutary and necessary right of improving on that which has already been invented. It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand, and correctly describe, just what he has invented, and for what he claims a patent."

Merrill v. Yeomans, 94 U. S. 568, 573-74.

(c) "All claims are required to be definite, so that the public may know what they are prohibited from doing during the term of the patent, and what they are to have at the end of the term, as a consideration for the grant. *Brooks v. Fiske*, 15 How. (56 U. S. 1), 212, 214-15;"

Walker on Pats., Deller's Ed. 1233, 4.

(d) "The statutory requirements relevant to particularity in the descriptions and claims of Letters Patent are conditions precedent to the authority of the Commissioner of Patents to issue such documents, and if such document is issued, the description or claims in which do not conform to these requirements, then that document is void."

Walker on Pats., Deller's Ed. 1273.

(e) "The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them."

Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co., 1 F. 2d 673, 679 (C. C. A. 9),

quoting with approval from:

McClain v. Ortmyer, 141 U. S. 419, 423.

LAW POINT 3.

The Courts Should Not *Change* the Meaning or Scope of Claims by Reading Elements Into Them.

(a) "Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specifi-

cation, so as to make it include something more than or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this Court that it is unnecessary to pursue the subject further."

White v. Dunbar, 119 U. S. 47, 51.

(b) "Since the inventor must particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery, the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is."

Howe Machine Co. v. National Needle Co., 134 U. S. 388, 394.

(c) "While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that if we once begin to include elements not mentioned in the

claim in order to limit such claim and avoid a defense of anticipation, we should never know where to stop.”

McCarty v. Lehigh Valley Railroad Co., 160 U. S. 110, 116.

(d) “We should have no warrant for limiting the claims by the elements of the disclosure which they do not include, even if the elements were new. A patentee who claims broadly must prove broadly; he may not claim broadly, and recede as he later finds that the art unknown to him has limited his invention. That is the chance he must take in making broad claims; if he has claimed more than he was entitled to, the statute does give him a *locus poenitentiae*, but he must seasonably disclaim the broad claims *in toto*. He may not keep them by interpretative limitation; he must procure new claims by reissue. This is the significance of *Milcor Steel Co. v. George A. Fuller Co.*, 316 U. S. 143 (53 USPQ 268).”

Foxboro Co. v. Taylor Instrument Co., 157 F. 2d 226 (70 USPQ 338, 343).

(e) “It (Appellant) urges upon us the application of the rule that claims must be read and construed in the light of the specification and so liberally interpreted as to uphold and not destroy the right of the inventor in the substance of his invention. *Westinghouse E. & M. Co. v. Quackenbush*, 53 F. 2d 632 (11 U. S. P. Q. 44) (C. C. A. 6), and cases therein cited. We are of the opinion that the rule there applied is limited to claims that are ambiguous and so require construction, and is in no event applicable where it appears to be clear that the inventor sought a broader monopoly than would seem to be justified by his invention as he has described it.”

Aluminium Co. of America v. Thompson Products, Inc., 122 F. 2d 796 (51 U. S. P. Q. 237, 239).

LAW POINT 4.

To Be Equivalent, a Device Must Perform the Same Function in Substantially the Same Way.

(a) "One thing, to be the equivalent of another, must perform the same function as that other. *Machine Co. v. Murphy*, 97 U. S. 120, 125 (1878); *Rowell v. Lindsay*, 113 U. S. 97, 103 (1885); *Roller Mill Patent*, 156 U. S. 261 (1895)."

Walker on Pats., Deller's Ed. 1704.

(b) "The fact that one thing performs the same function as another, though necessary, is not sufficient to make it an equivalent thereof. *Eames v. Godfrey*, 1 Wallace (68 U. S.) 78 (1864); *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 569 (1898)."

Walker on Pats., Deller's Ed. 1706.

(c) "Function must be performed in substantially the same way by an alleged equivalent, as by the thing of which it is alleged to be an equivalent, in order to constitute it such. *Burr v. Duryee*, 1 Wall. (68 U. S.) 531, 573; *Forncrook v. Root*, 127 U. S. 176, 181 (1888)."

Walker on Pats., Deller's Ed. 1706.

(d) "But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. * * * 'That two machines

produce the same effect will not justify the assertion that they are substantially the same, or that the devices used by one are therefore mere equivalents for those of the other.' ”

Boyden Power-Brake Co. v. Westinghouse, 170 U. S. 537, 568, 569.

(e) “If an invention is only a trifling step forward and the claims speak plainly, they preclude resort to the doctrine of equivalents as regards alleged infringement. *Deitel v. Unique Specialty Corporation*, 54 F. (2d) 359, CCA 2 (1931).”

Walker on Pats., Deller's Ed. 1240.

LAW POINT 5.

Unless Invention Is Present the Patent Is Invalid.

(a) “Under the statute, (R. S. 4886) the device must not only be ‘new and useful,’ it must also be an ‘invention’ or ‘discovery.’ ”

Cuno Eng. Corp. v. Automatic Devices Corp., 314 U. S. 84, 90; 51 USPQ 272, 275.

(b) “Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent, more ingenuity must be involved than the work of a mechanic skilled in the art.”

R. G. LeTourneau, Inc. v. Gar Wood Industries, Inc., 151 F. 2d 432; 67 USPQ 165 (CCA 9).

(c) “In *Smith v. Nichols*, 88 U. S. 112, 119, the Court said:

‘But a mere carrying forward or new and more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.’

* * * Accordingly, the flared construction is not such invention as will sustain a patent.”

Wilson-Western Sporting Goods Co. v. Barnhart,
81 F. 2d 108; 28 USPQ 125 (CCA 9).

(d) “In the case of *Klein v. City of Seattle*, 77 Fed. 200, 204, this Court said:

‘A patent must combine utility, novelty, and invention. It may in fact embrace utility and novelty in a high degree, and still be only the result of mechanical skill as distinguished from invention * * * It is not enough that a thing shall be new * * * and that it shall be useful, but it must under the Constitution and statute, amount to an invention or discovery.’

The principles stated in these decisions are well settled and require no further discussion.”

Keszthelyi v. Doheny Stone Drill Co., 59 F. 2d 3;
13 USPQ 427 (CCA 9).

(e) “In *Grinnel Machine Co. v. Johnson Co.*, 247 U. S. 426, 432, the Supreme Court stated:

‘No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices singly or in combination.’

All of the elements of the patent in suit were present in the prior art and combining these elements to make the patented device did not involve invention.”

Eagle, et al. v. P. & C. Hand Forged Tool Co.,
74 F. 2d 918; 24 USPQ 181 (CCA 9).

1. The first part of the report is devoted to a general description of the work done during the year.

2. The second part contains a detailed account of the results of the experiments carried out during the year.

3. The third part is devoted to a discussion of the results and to a comparison with the results of other workers.

4. The fourth part contains a summary of the work done during the year.

5. The fifth part contains a list of references.

6. The sixth part contains a list of symbols and abbreviations.

7. The seventh part contains a list of figures.

8. The eighth part contains a list of tables.

9. The ninth part contains a list of appendices.

No. 11,991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALVA G. BLANCHARD,

Appellant,

vs.

J. L. PINKERTON, INC., a corporation, and J. L. PINKERTON,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

This is a clear and flagrant case of deliberate appropriation of a meritorious invention by a wanton and willful infringer.

Simple physical comparison of Plaintiff's Exhibits 5 and 12, the plaintiff's and defendants' commercial products herein, shows convincingly that *one of them was deliberately copied from the other.*

As to which one copied the other, the uncontroverted record in this case shows that appellant first thought about his invention in 1932 or 1931 [R. p. 100], and even the appellees admit that the testimony shows that the appellant made his invention in 1933, built one in 1933 and sold one in 1934 [R. p. 101], whereas appellee Pinkerton did not even start the drawings for his accused structure until the latter part of 1938, after he had seen appellant's commercial embodiment of the patents in suit [Appellant's Op. Br. p. 48, and R. pp. 24, 229 and 267.] Even Appellees' Brief (p. 4) makes no earlier claim than 1937.

When the appellee Pinkerton copied the appellant's commercial embodiment of the patents in suit in the latter

part of 1938 he did not have a patent attorney to dig up antiquated paper patents, or to build a theory of non-infringement, nor did he design his structure to resemble some prior art device.

Instead he had only the appellant's commercial device before him. Appellee Pinkerton didn't even have the patents in suit before him to try to get around them, because they had not issued in 1938 when he copied appellant's structure. The first one, No. 2,199,611, issued on May 7, 1940, and the second one, No. 2,233,395, did not issue until March 4, 1941.

Naturally, under these circumstances, appellee Pinkerton produced a Chinese copy of the appellant's patented inventions. The extent of the embarrassment of appellees' present attorney in now trying to fabricate at least a pretense of a defense of non-infringement is shown by his frank admission at page 44 of Appellees' Brief herein as follows:

"It is true that appellees' device accomplishes the same result as that accomplished by appellant's."
(Appellees' Br. p. 44.)

Appellees' unsupported assertion (Appellees' Br. p. 44) that that same result is accomplished by a different structure in a different way is mere "whistling in the dark," for appellee Pinkerton at the trial had already unequivocally admitted that his accused device operates *in the same identical way*, as was pointed out at pages 19-20, 22-23, 27-28 and 60-61 of Appellant's Opening Brief, and comparison of the claims with the appellees' accused device shows that the structures are *not* different.

A few of appellee Pinkerton's succinct and unequivocal admissions that the way of operation is the same are these:

"Q. By Mr. Jamieson: Does your valve do anything in addition to what Blanchard's does, the first one? A. No." [R. p. 282, Appellant's Op. Br. p. 27.]

"Q. The result is exactly the same? A. Yes.

Q. *And the way that result is accomplished is the same in both valves, isn't it?* A. Yes." [R. p. 284, Appellant's Op. Br. p. 28.]

Since the appellees admit unequivocally that their accused device does "*exactly*" the same work in the same way, identity of mode of operation, function and result are proven by appellees' own admissions. It remains only to compare the elements of the claims to show that the structures are the same in order to complete the conclusive showing of infringement.

The First Patent in Suit No. 2,199,611.

Claim 1 of this patent is typical, and representative. Embodiment of all of the elements of Claim 1 of this patent in appellees' accused device is *clearly, unambiguously and conclusively* shown as follows:

A Housing.

This element is shown at 1 in Figures 1 and 2 of Exhibit 10. It is described at lines 46 to 48 in column 1 of page 1 of the specification of this patent in suit and infringement of it is clearly shown at page 64 of the Record herein.

Clearly, appellees' accused structure includes "a housing."

A Plurality of Outlet Passages Through Said Housing.

These outlet passages are shown at 8 and 9 in Figure 2 of Exhibit 10, showing defendants' accused structure which clearly meets this element of claim 1 of this patent in suit.

A Valve in Each of Said Passages.

These valves are shown at 15 and 16 in the appellees' accused structure in Figure 2 of Exhibit 10.

This element of claim 1 is described at lines 7 to 11 in column 2 on page 1 of the specification and infringement of it is fully shown at page 64 of the Record on this appeal.

Said Valves Having Slots of Varying Lengths in One End to Determine the Order in Which They Are Opened.

Infringement of this element by appellees' accused structure was fully shown at pages 15 to 20, inclusive, of Appellant's Opening Brief, and it is not necessary to repeat here what is pointed out there.

It is sufficient to point out here that appellees did not reply to pages 15 to 20, inclusive, of Appellant's Opening Brief in Appellees' Brief.

Obviously this element of claim 1 is clearly infringed by appellees' accused structure.

A Pin Through Said Slot.

Infringement of this element of claim 1 was equally clearly pointed out at pages 21 to 25, inclusive, of Appellant's Opening Brief. Appellees did not reply to these pages of Appellant's Opening Brief in their brief, either.

Clearly infringement of this element has been established by appellant and has not been disproved by appellees.

Operated by a Lever Fulcrumed Within Said Housing.

Obviously the two parts of the pin 25 in the appellees' accused structure are operated by lever 20 and lever 20 is fulcrumed at 24 within the housing 1.

Appellee Pinkerton admitted that his accused lever does substantially the same work in substantially the same way as follows:

"Q. Referring to this Exhibit 5 and our Exhibit 12, would you say that the lever arms do the same work in those two in substantially the same way?
. . . A. Yes." [R. p. 271.]

A Float on the End of Said Lever.

Float 33 is attached to the end of lever 20 by pin 34. Appellee Pinkerton also admitted that their float works substantially the same as the float of this patent in suit.

"Q. Does your float work substantially the same as the float on Blanchard's? . . . A. Yes." [R. p. 271.]

Whereby Said Valves Are Opened One at a Time in Sequence, Responsive to the Downward Movement of Said Float.

This element is described and explained at lines 7 to 17 of page 2 column 1 of the specification of this patent in suit and infringement of this element is shown fully at pages 65 to 66 of the Record on this appeal.

Also the appellee Pinkerton admitted that the appellees' accused structure operates substantially the same as that of this patent in suit. [R. p. 271, *supra*.]

It is quite clear that the plurality of valves of appellees' structure are opened one at a time, in sequence and in response to the downward movement of float 33. Clearly this element is present in the appellees' accused structure.

This clear showing that the structure of appellees' accused device is the same as, or the equivalent of, the elements of this claim, coupled with the appellees' unequivocal admissions that the mode of operation, function and result of appellees' accused device is the same as that patented by this claim, proves conclusively that appellees' accused structure is an infringement of claim 1 of this patent in suit No. 2,199,611.

Claims 2 and 5 of Patent in Suit No. 2,199,611.

Space limitations in this brief do not permit similar comparison of claims 2 and 5 of this patent in suit No. 2,199,611 with appellees' accused structure but such comparison will show that claims 2 and 5 are equally clearly and effortlessly infringed, as was fully pointed out at the trial, in the evidence and in Appellant's Opening Brief.

The Second Patent in Suit No. 2,233,395.

Nowhere in the record of this case, nor in Appellees' Brief, do appellees even attempt to show non-infringement of this patent in Suit No. 2,233,395.

Appellees have never dared to compare the elements of claim 1 of this patent in suit No. 2,233,395 with their accused structure because they *know* that this claim "reads on" their accused structure and covers it fully.

Infringement of claim 1 of this second patent in suit, No. 2,233,395, is so clear that, as predicted at page 53

of Appellant's Opening Brief, appellees did not deny it in their brief.

For the convenience of the Court appellant will briefly point out this clear infringement of claim 1:

A Safety Apparatus for Boilers Including the Combination of.

Appellee Pinkerton admitted on cross-examination that the advantage of his accused structure over the non-infringing Exhibits "E" and "F" was "safety for boilers." [R. p. 273.]

A Fuel Supply Conduit.

This is shown at 20a in Figure 1 on the right hand side of Plaintiff's Exhibit 8 and at 20a in Figure 2 on the right hand side of Plaintiff's Exhibit 9. Clearly this element of Claim 1 is present in the appellees' accused structure, as was pointed out at page 72 of the Record herein.

A Valve in Said Conduit.

This is described at lines 37 to 38 in column 2 on page 1 of the patent in suit and it is shown at 20 on the right hand side of Figure 1 in Exhibit 8. It is also shown in detail in Figure 2 on the right hand lower drawing in Exhibit 9.

This part of appellees' accused structure is identical with the appellant's patented structure, as is seen by comparing the two structures on the opposite sides of each of these Exhibits 8 and 9. This was pointed out fully at page 72 of the Record herein.

Means for Yieldingly Holding Said Valve Open.

This is shown at the spring 77 in Figure 2 on the right hand lower side of Exhibit 9. This spring 77, mounted on the bottom of the chamber in which it is situated and urging upwardly against the bottom of the member 73, holds the valve 75 off of its seat 76, and hence in the open position shown in Figure 2 in the lower right hand side of Exhibit 9.

This structure is likewise identical with the appellant's structure shown in the patent in the lower left hand side of Exhibit 9. It is described at lines 17 to 18, column 2,

page 2 of the specification and infringement is fully shown at pages 72 to 73 of the Record herein.

A Compartment.

This compartment is shown at 72 in Figure 2 in the lower right hand side of Exhibit 9. It is described in lines 12 to 14, 26, 32, 36 and 38 to 39 in column 2 on page 2 of the specification and infringement is shown at page 73 of the Record.

A Diaphragm.

This, or its equivalent, is shown at 73 in the lower right hand side of Figure 2 of Exhibit 9. The particular mechanism that is used by appellees is a leather cup that effects a positive seal and yet has a sliding fit so that it does not permit fluid to get past it. Similarity and equivalency of this structure and the Blanchard diaphragm was shown by appellant at pages 73 and 271 of the Record.

On cross-examination appellee Pinkerton admitted that his leather cup acts as a seal and that it does the same work in substantially the same way as the Blanchard diaphragm shown in this patent in suit as follows:

“Q. Did that leather cup act as a seal? A. Yes.

Q. Do you consider that an equivalent or the same thing as the Blanchard diaphragm? A. The same thing, no.

Q. What? A. I can't call it the same thing.

Q. Do they do the same work in substantially the same way? A. I would say yes.” [R. p. 271.]

A Protective Liquid for Said Diaphragm in Said Compartment.

This protective liquid fills the compartment 72 above the sealing means 73 and protects the sealing means from the deteriorating effects of the steam in the boiler. It is described at lines 18 to 32 in column 1 on page 3 of the specification of this patent in suit and infringement is shown at page 73 of the Record on this appeal.

Connections Between Said Diaphragm and Valve.

This connection is shown in the lower right hand corner, Figure 2, of Exhibit 9 at 74, which is a rod connecting the member 73 with the valve 75 in the same

manner that the similar parts in the appellant's structure, shown opposite, are constructed and operated.

This is also described at page 74 of the Record and infringement is fully shown there.

**Means for Supplying Fluid Under Pressure to Said
Compartment for Flexing Said Diaphragm and
Moving Said Valve to Closed Position.**

Infringement of this element of claim 1 of this patent in suit, No. 2,233,395, was fully shown at pages 54 to 62, inclusive, of Appellant's Opening Brief. Appellees have not replied to this in any way in their brief and therefore infringement of this element stands admitted because it was proven by appellant and not denied by appellees.

That the "means" referred to in this element of this claim cover the means clearly shown in the description of the patent specifications as pointed out at pages 54 to 62, inclusive, of Appellant's Opening Brief, has been twice held by this court in late leading cases as follows:

In *Petersen v. Coast Cigarette Vendors*, 131 F. 2d 389, this Court, speaking through Judge Wilbur, said at page 391:

"This (35 U. S. C. A. 33) only requires that the claims point out the invention, not that they redescribe it. This Court has accordingly held, in the case of *Shull Perforating Co. v. Cavins*, 9 Cir. 94 F. 2d 357, 364, that 'where the means referred to in claims are clearly shown in the description of the patent, this description is sufficient to cover the means thus disclosed and its mechanical equivalents.' In conformity with this view, we hold that the present patent is sufficient in form to cover the latch-releasing means described in the specifications, and mechanical equivalents thereof."

In *Shull Perforating Co., Inc., v. Cavins, et al.*, 94 F. 2d 357, this Court, again speaking through Judge Wilbur, said at page 364:

"The patentee is entitled to have the claims of the patent construed with reference to the drawings and specifications. Where the means referred to in claims are clearly shown in the description of the patent, this

description is sufficient to cover the means thus disclosed and its mechanical equivalents. Walker on Patents, 6 Ed., vol. 1, p. 195, paragraph 162a. This was this court's holding in *Henry v. City of Los Angeles*, *supra*. (9 Cir. 255 Fed. 769.) See, also, *Wessel v. United Mattress Mach. Co.*, 6 Cir., 130 F. 11, 15."

The "means" referred to in the patent in that suit was "means for effecting a delayed movement of the valve away from its seat." Thus this is a holding that the use of the word "means" entitles the patentee to the means shown and described in the patent and the mechanical equivalent thereof.

At pages 54 to 62, inclusive, of Appellant's Opening Brief it was fully shown that appellees' accused structure embodies the "means" referred to in this element that are shown and described in this patent in suit or the mechanical equivalent thereof.

Manually Operable Means for Relieving the Fluid Pressure on Said Diaphragm.

This manually operable means is shown at 78 and 78A in Figure 2 in the lower right hand corner of Exhibit 9. It operates in substantially the same manner and produces identically the same result as the manual release means 78 and 78A in Figure 6 of the patent in suit, No. 2,233,395, shown opposite thereto.

This element was described at lines 34 to 36 in column 2, page 2 of the specification of this patent in suit and infringement thereof was pointed out at pages 74 to 75 of the Record on this appeal.

The foregoing clearly shows infringement by appellees' accused structure of claim 1 of this patent in suit, No. 2,233,395.

In the face of this clear infringement, appellees do not anywhere in their brief deny that their accused structure includes all of the elements described in this claim 1 of this patent in suit, No. 2,233,395.

Therefore, they in effect concede that the Lower Court was in error in holding that this claim is not infringed by their accused structure.

Some Fallacies in Appellees' Brief.

Before disposing of the prior art in evidence herein appellant will first clear up some of the more glaring fallacies made by appellees in their brief.

1. Appellees' "Pioneer Patent" Fallacy.

Appellees assert throughout their brief that appellant contends that one or both of the patents in suit is a "pioneer" and they even assert, without any foundation whatsoever, at page 2 of their brief that appellant admits that:

"Unless the patents in suit are pioneer in character they cannot be interpreted broadly enough to be infringed by the appellees' structures."

The utter falsity of this is seen by examining Appellant's Opening Brief carefully and noting that the appellant does not at any place therein assert that either patent in suit is a "pioneer." In fact the word "pioneer" does not appear even once in Appellant's Opening Brief.

Instead, appellant correctly stated (Appellant's Op. Br. pp. 8-9 and 55) that the patents in suit each represent a *substantial advance* in the art, and because of this *substantial advance* they are entitled to a *liberal interpretation* of the claims in issue.

A patent for a meritorious invention is always given a liberal interpretation by the courts, whether or not it is a "pioneer." (*National Battery Co. v. Richardson*, 63 F. 2d 289 at 293.)

There is no doubt that the inventions here in suit are "meritorious" and that they made a distinct step in the progress of the art.

Therefore, they are entitled to a "*liberal construction*" under the authorities cited at page 9 of "Appellant's Opening Brief."

2. Appellees' Fallacy That They May Attack the Validity of the Patents in Suit.

On pages 12 to 13 of Appellant's Opening Brief appellant pointed out that *appellees may not attack the validity of the patents in suit* because they did not cross-appeal. The law cited at pages 12 and 13 of Appellant's Opening Brief holds this clearly and is not disturbed by the law cited at pages 8 to 9 of Appellees' Brief which merely holds

that this Court has the *power*, on its own initiative, to declare any patent before it invalid. Appellant has never denied this, as will be seen by *reading* "Appellant's Opening Brief."

Appellant merely pointed out that the *appellees* cannot attack the validity of the patents in suit because they did not cross-appeal.

If this were not so a cross-appeal would be meaningless and an utterly futile procedure. Also, it would not be fair to permit the appellees to attack the validity of the patent without cross-appealing and paying half of the cost of the appeal.

If appellees had wanted to question the validity of the patents they should have cross-appealed and paid half the costs on this appeal in the first instance.

They refused, or failed to do so and they cannot obtain the same results by this illegal method.

Therefore, under the authorities cited at pages 12 and 13 of Appellant's Opening Brief, appellant now hereby moves to strike from the record all of the parts of Appellees' Brief which attack the validity of the patents in suit herein.

In support of this Motion appellant submits the following:

In *Tjosevig v. Donohoe*, 262 Fed. 911, Judge Gilbert of this Court says at page 918:

"The appellees, not having appealed from the decree awarding them affirmative relief, cannot review the denial of a portion of the relief which they sought. (Citing cases.)"

In *Gay v. Focke*, 291 Fed. 721, Judge Hunt of this Court, with Judges Gilbert and Rudkin concurring, says at page 727:

"No appeal having been taken from the decree of the Supreme Court by the life tenants or the trustees, they will not be heard to say that the Supreme Court was in error in holding that there is a distinction between the proper construction to be put upon the will as to the two leases. We are therefore limited to the second question presented by appellants." (Citing cases.)

In *Sanborn-Cutting Co. v. Paine*, 244 Fed. 672 at page 681, Judge Hunt of this Court, with Judges Gilbert and Ross concurring, said:

“As the trustee took no appeal from the decree of the District Court, we may not consider the point made in his brief that the Court erred in not making the allowance referred to. (Citing cases.)”

In *Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593 at 597, 598, the Supreme Court of the United States says:

“Without a cross-appeal, an appellee may ‘urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.’ *United States v. American Railway Express Co.*, 265 U. S. 425, 435, 68 L. Ed. 1087, 1093, 44 S. Ct. 560. What he may not do in the absence of a cross-appeal is to ‘attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.’ *Ibid.* The rule is inveterate and certain.” (Citing cases.) . . .

“‘Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.’ *The Maria Martin (Martin v. Northern Transport Co.)*, 12 Wall. 31, 20 L. Ed. 251, *supra.*”

The appellees’ complete disregard of rules should not be tolerated or allowed to pass unnoticed by this Court.

The alleged use of the asserted 1932 structure was not pleaded as a defense. Therefore it cannot be used as an anticipation. 35 U. S. C. S. 69 (5).

This was HELD by the trial court [R. p. 14 herein] and the appellees did not appeal nor cross-appeal from this holding.

Yet the appellees' whole brief is SHOT THROUGH with references to this incompetent, irrelevant asserted 1932 matter, just as if they had pleaded it.

Had they pleaded it, appellant would have brought evidence from his home in Louisiana carrying his dates back.

It would be unfair and contrary to the rules to now permit appellees to argue this asserted 1932 structure. All reference to it should be stricken from this case and it should be completely disregarded by this Court.

This is similar to the appellees' complete disregard of the holding of the Supreme Court of the United States in *Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, 597-598, *supra*, and the holdings of this Court, quoted immediately hereinabove, which specifically hold that the appellees may not attack the decree in the absence of cross-appeal.

All attacks by appellees on the validity of the patents in suit should be stricken from their brief and they should be promptly stopped if they attempt to argue orally at the oral hearing that the patents in suit are invalid. This should be done with great firmness under the decisions of this Court and the decision of the Supreme Court in *Construction Co. v. Maryland Casualty Co.*, *supra*.

3. Appellees' Fallacy of Patenting Results.

Throughout Appellees' Brief they seek to infer that appellant invented a result and that he did not get any claims to cover that result. A typical statement like that is found on page 13 of Appellees' Brief, as follows:

"All of the discussion in Appellant's Brief about the importance of warning the fireman *before* the boiler was shut down has nothing whatsoever to do with this case because appellant was not awarded any claims whatsoever covering that idea."

Obviously, it is not possible to patent a result. The only thing that is patentable is the *means* by which that result is accomplished. In this case, appellant secured claims covering the *means* by which this most beneficial result is obtained. It is sheer waste of time for appellees to urge that appellant did not patent this *result*, as it is impossible under elementary patent law for anyone to patent any result.

4. Appellees' Fallacy of "Broadened Claims."

In various places in Appellees' Brief they assert that appellant attempted to get broad claims in the file wrappers of the patents in suit, but then did not secure them, and that appellant is now seeking to broaden the claims that he did secure to cover such asserted cancelled claims.

However, appellees do not point out a single claim in either file wrapper to illustrate this point, because such claims are not present.

In this case there is no prior cancelled claim that in any way casts a shadow of a restriction on the issued claims in suit herein. Appellees' vague, general charges will not evade the clear infringement of the valid claims in issue herein.

5. Appellees' Check Valve 79 Fallacy.

Appellees tried to insert check valve 79 into claim 1 of patent in suit No. 2,233,395 (Appellees' Br. pp. 28-30, *et al.*), but this cannot be done, as a mere reading of the claims shows clearly that this check valve is not an element of this claim.

This is clear fundamental law. It is stated in the leading patent textbook, Walker on Patents, Deller's Edition, Section 241 at page 1207, as follows:

"A claim will not be narrowed by importing into it, by construction, any dispensable element, in order to enable an infringer to escape the consequences of his infringement. (*Lamson Cash Ry. Co. v. Keplinger*, 45 Fed. 245, 249, C. C., Ohio; *Crown Cork & Seal Co. v. Sterling Cork & Seal Co.*, 217 Fed. 381, 386, C. C. A. 6.)

This law effectively answers appellees' attempts to read check valve 79 into claim 1 of patent in suit No. 2,233,395 by construction.

6. Appellees' 1932 Fallacy.

Another fallacy constantly reiterated by appellees in their brief is that their 1932 structure and their accused structures are the same. This is an absolute falsity and appellees themselves admit that they changed their 1932 structure to produce their accused structure. An illustration of this is found at page 6 of their brief, where they say:

"In producing the accused structure the appellees . . . added an extra needle valve to their 1932 structure . . . and connected the second valve to the float arm."

This admission alone shows the two structures are different. Comparison of the two structures shows that they are entirely different and achieve entirely different results. The accused structure accomplishes the results of the patents in suit. The 1932 structure does not.

Another place in Appellees' Brief where they admit that their 1932 structure is not the same as their accused structure is at page 40 of their brief, where appellees say:

"To meet this need the appellee Pinkerton in 1937 . . . modified his 1932 structure to delay the action of the fuel shut off valve until after the alarm whistle had blown."

This admission alone shows that appellee Pinkerton varied and modified his non-infringing asserted 1932 structure to produce the accused structure, which is a clear infringement of both patents in suit.

Appellee Pinkerton admitted that he had seen one of the appellant's patented structures at least as early as "late '38" and that he had seen their catalogues "approximately around the same time." [Tr. p. 267.] Obviously he designed his accused structure after he saw the appellant's patented one.

Appellee Pinkerton never obtained a patent on his structure. Nor did he even apply for one at any time as far as this record shows. He simply copied the appellant's structure.

Summary.

With these matters cleared up appellant will now show that the patents in suit are clearly valid and that the above interpretation of them which shows clear infringement does not render any claims invalid because of any prior art structure.

The Prior Art.

A. IT MAY BE DISREGARDED.

When the appellee Pinkerton was sued for infringement he did not know what the patents in suit covered, for he did not know what they covered even when he came to

the trial. He merely hired a lawyer to try to get him out of his infringement and he "left that to Mr. Fulwider." [R. p. 280.]

By the time that appellees' attorney was called into the case the appellees' accused structure had been on the market for some time and no change was made in this Chinese copy of the appellant's structure. Instead, the appellees' attorney made a search of the Patent Office and found all of the references cited in the file wrappers of the patents in suit and a few cumulative references, but even appellees' astute counsel did not dare to put a witness on the stand to try to explain these references or compare them with the patents in suit, as it was obvious that on cross-examination such a witness would have been forced to admit that the prior art did not in any way affect the clear infringement and validity of this patent in suit.

Appellees do not quote or cite a single line of testimony from the Record in this case in their brief. Instead their entire brief is mere windage—written arguments from prior art patents dumped into the Record.

Under these circumstances this Court can completely disregard all of the prior art patents, if it so desires, under the following authorities:

In *Benbrow-Brammer Mfg. Co. v. Heffron-Tanner Co.*, 144 Fed. 429, the Court says at page 431:

"A large number of prior patents have been placed before this Court without evidence explaining them or their operation and it would be proper to wholly disregard them. *Waterman v. Shipman*, 55 Fed. 982."

In *Waterman v. Shipman*, 55 Fed. 982, the 2nd C. C. A. says at page 987:

"To sustain the defense of want of novelty the defendants have set up in their answer, and offered in evidence, a large number of patents prior in date to those of the complainant.

"*In the absence of any expert testimony to explain these patents, or indicate what they contain tending to negative the novelty of the complainant's patents, we do not feel called upon to examine them.*" (Emphasis ours.)

This was followed by the 2nd C. C. A. in *Bell v. McKinnon*, 149 Fed. 205, where the Court says:

"Anticipation is claimed, but the defense is only suggested by injecting a large number of prior patents into the record without any explanatory testimony.

"If an examination of the prior art were necessary to the decision of the case, we should not sustain the defense of anticipation upon such mere production of patents."

In *General Electric Co. v. Germania Co.*, 174 Fed. 1013, at 1015, the Court said:

"... the defendant . . . has presented no evidence of the invalidity of the patent in suit, other than that it *has dumped into the case 16 patents in the prior art*, without a word of explanation or any expert testimony to show wherein or how, if at all, they disclose or anticipate the invention embraced in the patent in suit. . . . The complainant's testimony . . . is wholly uncontradicted, unless by inferences to be drawn from the patents alleged to show the prior art. In this situation the patents referred to, under the authorities, need not, and will not, be considered at length."

Not only did appellees fail and refuse to put any witness on the stand to explain the prior art patents they "dumped into the record," but when appellant, in rebuttal [R. pp. 293-302], explained away all the "best references" selected by appellees from their prior art exhibits, the appellees as a matter of course were afforded the opportunity to cross-examine appellant's witness and appellees refused to do so, saying:

"Mr. Fulwider: No cross." [R. p. 302.]

Appellees' refusal to cross-examine appellant's witness on appellees' prior art and appellees' refusal or failure to produce a witness of their own admit the correctness of appellant's views of appellees' prior art.

Certainly in view of this refusal this Court is justified under the above authorities in refusing to examine or consider these prior art patents.

Appellant will now dispose of the prior art that was "dumped into the Record" by the appellees in the court below.

B. PARKER PATENT No. 1,965,052.

Replying to the points sought to be made by appellees in their brief regarding Parker, the first point is that Parker is not a "safety apparatus for boilers" but it is a mere steam boiler control and provides no means for shutting off the fuel until it is manually released. The fuel in Parker goes on and off with the fall and rise of the pressure, which is not true of the appellees' and appellant's devices in this case. In appellees' and appellant's devices, once the fuel is shut off it remains shut off until the manual release is operated by hand.

Also Parker does not have "a compartment." The cylinder shown in Figure 8 of Parker is not a "compartment." The piston 39 is not a *sealing* piston, as is proven by the fact that there is a drain valve 32 *below* it. The presence of this drain valve 32 demonstrates conclusively that the Parker piston 39 is not a *positive seal*, as is the appellant's diaphragm and the appellees' leather sealing means. Therefore, there is no "compartment" above a "diaphragm" in Parker.

The next element that is missing in Parker is a "diaphragm." As is pointed out hereinabove, the piston 39 in Parker does not effect a seal and it is not, in any sense of the word, an equivalent of the Blanchard diaphragm. This is proven by the presence of the drain cock 32 *below* the Parker piston 39. Also, the Parker piston 39 will move above the other drain on the right hand side of Figure 8, showing that there is no seal intended.

The next element of claim 1 of this patent in suit which is missing in Parker is "a protective liquid for said diaphragm in said compartment."

There is no way that any protective liquid could be retained above the piston 39 in Parker. Obviously, any liquid above the piston 39 will drain down and out the drain cock 32. The split piston ring will permit this drainage through its split.

On the other hand, there is no such drain cock below the diaphragm in the patent in suit or below the leather cups in the appellees' accused structure, as is seen by examining Figure 2 of Exhibit 9 in this case. It will be noted that the absence of any drainage means below the appellees' leather cup in Figure 2 of Exhibit 9 shows that the protective liquid is retained above this diaphragm. Also appellee Pinkerton admitted his leather cup effects a seal. [R. p. 271.]

On the other hand, no protective liquid can be retained above the piston 39 in Parker and this element of this claim is clearly missing.

Means for Supplying Fluid Under Pressure to Said Compartment for Flexing Said Diaphragm and Moving Said Valve to Closed Position.

This means is totally absent in Parker. This means is fully described and its clear presence in appellees' accused structure is demonstrated at pages 54 to 62, inclusive, of Appellant's Opening Brief.

If this Court will merely compare pages 54 to 62, inclusive, of Appellant's Opening Brief with the appellees' accused structure and with the Parker patent it will be able promptly to see the validity and infringement of this patent in suit without further effort. This is the real crux of this patent in suit and appellant feels that his position was fully presented at pages 54 to 62 of his Opening Brief, which can be easily compared with the appellees' accused structure and with the Parker patent thus using *the same test* to show the infringement and validity of this element of this patent in suit.

Manually Operable Means for Relieving the Fluid Pressure on Said Diaphragm.

No such manually operable means is present in Parker.

The appellees' attempt to find it in "the petcock without number in the upper end of Parker cylinder 31" at page 26 of their brief is not borne out by the structure. The presence of the petcock 32 below the piston 39 and the split piston ring show that any pressure or fluid above piston 39 would drain out below and therefore that the unnumbered petcock in the right hand upper part of

Figure 8 of Parker cannot function as a “manually operable means for relieving fluid pressure” above a “diaphragm.” This is also true because there is no “diaphragm,” or the equivalent thereof, to maintain a pressure above the piston 39 in Parker.

Also, the piston in Parker No. 39 will move above the petcock without number in the upper end of the Parker cylinder. In the position shown in Figure 8 it is partly obstructing the opening now and a slight movement upward will totally obstruct that opening or cause it to open below the piston 39. Certainly this element is not met in Parker.

Obviously Parker was neither designed nor intended to do the work of this patent in suit and it could not be used to perform the function of this patent in suit. If a Parker structure were built it could not be sold to the modern oil well tool trade in competition with the appellant's and appellees' devices in this appeal.

Parker is an utterly impractical paper patent which has been resurrected from the Patent Office by appellees' attorney to try to get them out of the clear infringement that they perpetrated when they copied the appellant's patented invention.

C. THE REMAINING PRIOR ART.

The remaining prior art was disposed of by appellant in his Opening Brief and by the Patent Office in the prosecution of the patents in suit.

No prior art device can accomplish the new and beneficial results accomplished by the patents in suit and by appellees' embodiment thereof in their accused structure.

Summary and Conclusion.

Conclusive infringement and validity of the claims in issue herein have been completely shown.

Appellant respectfully urges this Court to grant him the relief prayed for in the Complaint herein, to which he is justly entitled.

Respectfully submitted,

HAMER H. JAMIESON,

Attorney for Appellant.

No. 11995

United States
Circuit Court of Appeals
for the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the Estate of
LANIER SARLES WALLAN, Deceased, for and on be-
half of the surviving widow, MARGIE LEE WALLAN,
and the surviving daughters, BARBARA LEE WALLAN
and SUSAN JEANNETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-part-
ners, doing business under the assumed name and style of
RANKIN AERONAUTICAL ACADEMY, and JOHN
GILBERT RANKIN and R. S. NORSWING, co-partners,
d.b.a. RANKIN AVIATION INDUSTRY; R. S. NOR-
SWING, individually, and SHIRLEY LORRAINE RAN-
KIN, as Executrix of the Estate of JOHN GILBERT
RANKIN, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

AUG 20 1948

PAUL P. O'BRIEN,

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No. 11995

United States
Circuit Court of Appeals
for the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the Estate of
LANIER SARLES WALLAN, Deceased, for and on be-
half of the surviving widow, MARGIE LEE WALLAN,
and the surviving daughters, BARBARA LEE WALLAN
and SUSAN JEANNETTE WALLAN,

Appellant,

vs.

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ners, doing business under the assumed name and style of
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Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for
the Southern District of California, Northern
Division

No. 706-ND

MARGIE LEE WALLAN as Administratrix of
the estate of Lanier Sarles Wallan, deceased,
for and on behalf of the surviving widow,
MARGIE LEE WALLAN, and the surviving
daughters, BARBARA LEE WALLAN and
SUSAN JEANNETTE WALLAN,

Plaintiffs,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of Rankin Aeronau-
tical Academy, and JOHN GILBERT RAN-
KIN and R. S. NORSWING, co-partners, do-
ing business under the assumed name and style
of Rankin Aviation Industry; R. S. NOR-
SWING, individually, and SHIRLEY LOR-
RAINE RANKIN as Executrix of the estate of
John Gilbert Rankin, deceased.

Defendants.

CIVIL COMPLAINT

Plaintiffs for cause of action against the defend-
ants and each of them, alleges:

I.

That Margie Lee Wallan, the plaintiff herein, is
the duly appointed, qualified and acting adminis-

tratrix of the estate of Lanier Sarles Wallan, deceased, by virtue of an appointment duly made by the Circuit Court of the State of Oregon for Klamath County, and that such executor and the widow and the dependant daughters of plaintiff's decedent, at all times herein mentioned, were and are now bona fide residents, inhabitants and citizens of the State of Oregon, and non-citizens of the State of California; that Shirley Lorraine Rankin is the duly appointed, qualified and acting executrix of the estate of John Gilbert Rankin, deceased, by virtue of an appointment duly made by the Superior Court of the State of California for Tulare County, and that said John Gilbert Rankin, at the time [2] of the accident herein complained of, and each and every one of the defendants above named, were then, and at all times herein mentioned, and now are residents, inhabitants and citizens of the State of California, and that there is a diversity of citizenship existing between the plaintiffs and defendants herein.

II.

That more than the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs, is involved in this action.

III.

That at all times herein mentioned, the defendants, Rankin and Norswing, co-partners, doing business as Rankin Aviation Industry and/or Rankin Aeronautical Academy, were the owners and operators of a certain Republic Amphibian Seabee

Aircraft, Department of Commerce No. NC 6096K. and that the partner John Gilbert Rankin, in furtherance of the activities of said partnership, was the pilot thereof.

IV.

That on or about the 23rd day of February, 1947, at about the hour of 2:50 o'clock in the afternoon of said day, said John Gilbert Rankin, operating said Seabee Airplane, took off from the Klamath Falls Airport at Klamath Falls, Klamath County, Oregon, with the plaintiff's decedent, Lanier Sarles Wallan, as one of the passengers in said airplane; that said take-off executed by the said Rankin, as pilot, and the subsequent flight was done in a careless, negligent and reckless manner, in that, at the time and place of said take-off and flight, and under the conditions of the altitude of the airport, the temperature, density and pressure of the air then existing, the defendants caused said airplane to be overloaded, and maneuvered the same in such manner as to cause said airplane to be flown into and against some high-powered electric wires, or other obstructions, causing the same to [3] crash into the ground, causing the demise of plaintiff's decedent.

V.

That the defendants were careless, reckless and negligent in the operation of said aircraft in the following particulars, to wit:

a. In attempting to take off and fly said airplane when the same was overloaded;

b. In failing to keep a proper, or any, lookout for obstructions in the path of the flight of said airplane, and to so maneuver said airplane as to avoid colliding with such obstructions;

c. In failing to keep said airplane under proper control;

d. By failing to cause said airplane to gain sufficient forward speed to permit the climbing of same;

e. By attempting to fly said airplane in a "nose high" attitude, and at a critical angle of attack, thereby causing the same to mush and become incapable of climbing above the objects on the terrain in the path of said flight;

f. By taking off said airplane and attempting to fly same at or near the stalling speed;

g. That at all times and dates herein mentioned, there was in full force and effect, Civil Air Regulations of the Department of Commerce, Bureau of Aeronautics of the Government of the United States of America *inter alia* as follows, to wit:

"§ 43.1010. Aircraft Operation Record. An aircraft for which an air worthiness certificate is currently in effect, shall not be operated unless there is attached to such air worthiness certificate, an appropriate aircraft operation record, prescribed and issued by the Administrator, nor shall such aircraft be operated other than in accordance with the limitations prescribed [4] and set forth by the Administrator in such record. . . ."

That there was currently in effect for said Seabee aircraft, an air worthiness certificate and an aircraft operation record, prescribed and issued by the Administrator, which provided, inter alia, that said Seabee airplane was certificated under said Civil Air Regulations to be operated at a gross weight of not to exceed 3150 pounds. That at the time and place of said take-off and accident said aircraft was loaded and being operated by the defendants at a gross weight in excess of 3150 pounds, to wit: more than 3489 pounds.

VI.

That the acts of carelessness, recklessness and negligence as hereinbefore alleged, and each thereof, were the proximate cause of the accident herein complained of, and of plaintiff's decedent's death.

VII.

As a result of said accident, as aforesaid, the plaintiff's decedent, the said Lanier Sarles Wallan, received injuries from which he died;

VIII.

That at the time of his death, the said decedent left surviving him a widow, Margie Lee Wallan, and two dependent daughters, Barbara Lee Wallan and Susan Jeannette Wallan; that the plaintiff in this action as administratrix and personal representative prosecutes this action for the benefit of said Margie Lee Wallan and Barbara Lee Wallan and Susan Jeannette Wallan, as the surviving widow and daughters, respectively, of decedent; by virtue of and pursuant to Section 8-903 Oregon Compiled Laws Annotated, as amended.

IX.

That at the time of his death, the said Lanier Sarles Wallan was 39 years of age, and an intelligent, industrious and dutiful husband and father, with a life expectancy of approximately [5] 30.08 years.

X.

That at the time of said accident, the decedent left surviving him, his widow, Margie Lee Wallan of the age of 32 years, with a life expectancy of approximately 36 years; and his dependent daughter, Barbara Lee Wallan of the age of 10 years, with a life expectancy of 55 years; and his dependant daughter Susan Jeannette Wallan of the age of 8 years, with a life expectancy of approximately 57 years.

XI.

That prior to his death, the said Lanier Sarles Wallan was capable of earning and, in fact, did have, an income of more than Five Hundred (\$500.00) Dollars per month, out of which he supported his said widow and children.

XII.

That by reason of the wrongful death of said Lanier Sarles Wallan, occasioned by the negligence of the defendants as aforesaid, the estate of the said Lanier Sarles Wallan sustained a pecuniary loss and damage to its property as hereinafter alleged, and the said Margie Lee Wallan, his widow, and the said Barbara Lee Wallan and Susan Jeannette Wallan, his dependent daughters, have been

deprived of the care, aid and services of the said Lanier Sarles Wallan, all to their general damage in a sum greater than Ten Thousand (\$10,000.00) Dollars:

XIII.

That by reason of said wrongful death, the plaintiff was obliged to incur and pay funeral and burial expenses for the decedent to her special damages in the sum of \$745.00.

Wherefore, plaintiff demands judgment against the defendants, and each of them, for the sum of Ten Thousand (\$10,000.00) Dollars general damages, and for the further sum of \$745.00 special damages, and for her costs and disbursements herein [6] incurred.

/s/ JOHN B. EBINGER,
/s/ CHESTER E. McCARTY,
Attorneys for Plaintiff.

State of Oregon,
County of Klamath—ss.

I, Margie Lee Wallan, being first duly sworn, depose and say that I am the plaintiff in the within entitled cause, and the foregoing Civil Complaint is true as I verily believe.

/s/ MARGIE LEE WALLAN.

Subscribed and sworn to before me this 16th day of February, 1948.

(Seal) /s/ PEARL DUNLAP,
Notary Public for Oregon.

My commission expires September 9, 1949.

[Endorsed]: Filed Feb. 18, 1948. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
COMPLAINT

To Gerald Bridges, Esq., 216 West Sixth Street, Los Angeles, California; McCarty, Dickson & Swindells, 700 Yeon Building, Portland, Oregon; John E. Ebinger, U. S. National Bank Building, Klamath Falls, Oregon, Attorneys for the Plaintiff:

Please Take Notice that on Monday, the 5th day of April, 1948, at 10 a.m. of said day, or as soon thereafter as counsel can be heard, at the Courtroom of the Honorable Peirson M. Hall, Judge of the above-entitled Court, in Courtroom No. 3, Federal Building, City of Los Angeles, State of California, the above-named defendants and each of them will move the Court as follows: [8]

I.

To dismiss the complaint on the ground that the plaintiff has failed to state a claim against the defendants upon which relief may be granted.

II.

To dismiss the complaint on the ground that the plaintiff lacks capacity to sue.

III.

To dismiss the complaint on the ground that the defendants and each of them lack capacity to be sued.

IV.

To dismiss the complaint on the ground of lack of jurisdiction over the subject matter.

This motion will be based upon this notice of motion, the complaint on file herein and the memorandum of points and authorities attached hereto.

Wherefore, the defendants and each of them pray that the complaint be hence dismissed.

Dated this 18th day of March, 1948.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 22, 1948. [9]

In the District Court of the United States for
the Southern District of California, Northern
Division

No. 706-N.D.

MARGIE LEE WALLAN as Administratrix of
the estate of Lanier Sarles Wallan, deceased,
for and on behalf of the surviving widow,
MARGIE LEE WALLAN and the surviving
daughters, BARBARA LEE WALLAN and
SUSAN JEANNETTE WALLAN,
Plaintiffs,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of Rankin Aeronau-
tical Academy, and JOHN GILBERT RAN-
KIN and R. S. NORSWING, co-partners, do-
ing business under the assumed name and style
of Rankin Aviation Industry; R. S. NOR-
SWING, individually, and SHIRLEY LOR-
RAINE RANKIN as Executrix of the estate
of John Gilbert Rankin, deceased,
Defendants.

JUDGMENT

In this action the defendants, John Gilbert Ran-
kin and R. S. Norswing, co-partners, doing business

under the assumed name and style of Rankin Aeronautical Academy, and John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the assumed name and style of Rankin Aviation Industry; R. S. Norswing, individually, and Shirley Lorraine Rankin as executrix of the estate of John Gilbert Rankin, deceased, by their attorneys, O'Connor & O'Connor, by William V. O'Connor, Esquire, 530 West Sixth Street, Los Angeles, California, having appeared and filed a motion to dismiss the plaintiffs' [11] amended complaint herein, and the issue of law thereto arising having been duly submitted to the Court by the defendants, and having come on to be heard before this Honorable Court, and the Court, being fully advised in the premises, good cause appearing therefor, did, heretofore, to wit, on the 24th day of May, 1948, order that the said motion of the defendants to dismiss the said amended complaint in the above-entitled case be granted;

Now, Therefore, It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendants and each of them, and that the plaintiffs take nothing by this action, and that said de-

fendants and each of them have and recover their costs herein.

Dated this 3rd day of June, 1948.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form, pursuant to Rule 7 of the Local Rules, So. Dist. of California, this 3rd day of June, 1948.

/s/ GERALD BRIDGES,
Attorney for Plaintiffs.

Judgment entered June 3, 1948. Docketed June 3, 1948. Book 4, Page 352. Edmund L. Smith, Clerk, By [Illegible], Deputy.

[Endorsed]: Filed June 3, 1948. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice is hereby given that the plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 3, 1948.

GERALD BRIDGES,
Of Attorneys for Appellant.

[Endorsed]: Filed June 22, 1948. [13]

[Title of District Court and Cause.]

STIPULATION DESIGNATING
RECORD ON APPEAL

The above named parties, through their respective counsel, do hereby stipulate and designate for inclusion in the Record on Appeal the following:

I.

Complaint for Damages for Wrongful Death filed February 18, 1948, as amended by interlineation pursuant to Order of Court on May 3, 1948.

II.

Notice of Motion to Dismiss Complaint filed March 22, 1948.

III.

Judgment filed June 3, 1948.

IV.

Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed June 22, 1948.

V.

This Stipulation designating contents of record on appeal.

Dated July 21, 1948.

GERALD BRIDGES,
CHESTER E. McCARTY,
JOHN B. EBINGER,

By /s/ GERALD BRIDGES,
Attorneys for Plaintiff and Appellant.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR,
Attorneys for Defendants and Respondents.

[Endorsed]: Filed July 24, 1948. [15]

In the District Court of the United States,
Southern District of California, Northern
Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain full, true and correct copies of Complaint; Notice of Motion to Dismiss Complaint; Judgment; Notice of Appeal and Stipulation Designating Record on Appeal which constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$4.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26th day of July, A. D. 1948.

[Seal]

EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11995. United States Circuit Court of Appeals for the Ninth Circuit. Margie Lee Wallan, as Administratrix of the Estate of Lanier Sarles Wallan, Deceased, for and on behalf of the surviving widow, Margie Lee Wallan, and the surviving daughters, Barbara Lee Wallan and Susan Jeannette Wallan, Appellant, vs. John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the assumed name and style of Rankin Aeronautical Academy, and John Gilbert Rankin and R. S. Norswing, co-partners, d.b.a. Rankin Aviation Industry; R. S. Norswing, individually, and Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California. Northern Division.

Filed July 27, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11995

MARGIE LEE WALLAN as Administratrix of
the estate of Lanier Sarles Wallan, deceased,
for and on behalf of the surviving widow,
MARGIE LEE WALLAN, and the surviving
daughters, BARBARA LEE WALLAN and
SUSAN JEANNETTE WALLAN,

Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of Rankin Aeronau-
tical Academy, and JOHN GILBERT RAN-
KIN and R. S. NORSWING, co-partners, do-
ing business under the assumed name and style
of Rankin Aviation Industry; R. S. NOR-
SWING, individually, and SHIRLEY LOR-
RAINE RANKIN, as executrix of the estate of
JOHN GILBERT RANKIN, deceased.

Defendants.

APPELLANT'S POINTS ON APPEAL AND
DESIGNATION OF RECORD
POINTS RELIED ON BY APPELLANT

I.

The law of the State of Oregon provides a sub-
stantive right of action for damages resulting from
wrongful death which survives the deceased and
also survives the death of the wrongdoer and an

action for damages resulting from such wrongful death may be maintained by the personal representative of the deceased against the personal representative of the deceased wrongdoer.

II.

The law of the place of wrong governs rights of action arising from wrongful death.

III.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the deceased.

IV.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the death of the wrongdoer.

V.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, if by the law of the State where the wrong took place such right exists.

VI.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, against the personal representative of the deceased wrongdoer in the State of the forum, if by the law of the State where the wrong took

place such right exists against the personal representative of the deceased wrongdoer.

VII.

The law of the State of Oregon provides that an action for damages resulting from wrongful death must be brought by the personal representative (executor or administrator) of the deceased for the benefit of the surviving spouse and dependents of the deceased.

VIII.

If the law of the State where the wrongful death took place designates a particular representative to sue, such representative may bring such action in the District Court, having jurisdiction, in any State, as the owner of a claim in trust for certain distributees.

IX.

The law of the State of Oregon provides that the measure of damages in an action resulting from the wrongful death of a person, is the pecuniary loss suffered by the estate of the deceased.

X.

The law of the State of California provides that the personal representative of any person may maintain an action against the executor or administrator of a deceased wrongdoer who in his lifetime has wasted or destroyed the estate of such person by his wrongful death.

XI.

The pecuniary loss suffered by the estate of a deceased by reason of the wrongful death of such

deceased is a waste and destruction of the estate of such deceased by the wrongdoer within the purview of Section 574 of the Probate Code of the State of California.

XII.

A cause of action based on tort is not such a claim under the law of the State of California as must be presented to and rejected by the executor or administrator of the deceased wrongdoer as a condition precedent to and filing of an action thereon.

XIII.

When a cause of action for tort exists against co-partners, the liability of the partners is joint and several and the death of the partner who committed the tortious act does not relieve the surviving partner of liability nor abate an action against him based thereon.

DESIGNATION OF RECORD

Appellant designates the entire record as certified to by the Clerk of the District Court.

GERALD BRIDGES,
McCARTY, DICKSON &
SWINDELLS,
JOHN B. EBINGER,

By /s/ JOHN B. EBINGER,
Attorneys for Appellant.

[Verified.]

[Endorsed]: Filed Aug. 3, 1948. Paul P. O'Brien,
Clerk.

No. 11996

United States
Circuit Court of Appeals
for the Ninth Circuit

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, for and on behalf of the surviving widow, MATILDA C. ELIE, and the surviving daughter, JACQUELINE ELIE,
Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY; JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

AUG 20 1948

FILED



No. 11996

United States
Circuit Court of Appeals
for the Ninth Circuit

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, for and on behalf of the surviving widow, MATILDA C. ELIE, and the surviving daughter, JACQUELINE ELIE,
Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY; JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record ing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

GERALD BRIDGES,
215 West Sixth St.,
Los Angeles 14, Calif.

McCARTHY, DICKSON & SWINDELLS,
700 Yeon Bldg.,
Portland 4, Oregon.

JOHN B. EBINGER,
U. S. National Bank Bldg.,
Klamath Falls, Oregon.

For Appellees:

O'CONNOR & O'CONNOR,
530 West Sixth St.,
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Southern District of California,
Northern Division

No. 707-N.D.

THE FIRST NATIONAL BANK OF PORT-
LAND as executor of the estate of JOHN B.
ELIE, deceased, for and on behalf of the surviv-
ing widow, MATILDA C. ELIE, and the sur-
viving daughter, JACQUELINE ELIE,
Plaintiffs,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN and R. S. NORSWING, co-
partners, doing business under the assumed
name and style of RANKIN AVIATION IN-
DUSTRY; R. S. NORSWING, individually,
and SHIRLEY LORRAINE RANKIN as Ex-
ecutrix of the estate of JOHN GILBERT
RANKIN, deceased,

Defendants.

CIVIL COMPLAINT

Plaintiff for cause of action against the defend-
ants and each of them, alleges:

I.

That at all times and dates herein mentioned the
The First National Bank of Portland was and is
now a national banking association, organized and

existing by virtue of the laws of the United States of America, conducting a general banking and other business within the State of Oregon, and authorized to act as executor of Estates within the State of Oregon.

II.

That the The First National Bank of Portland, the plaintiff herein, is the duly appointed, qualified and acting executor of the estate of John B. Elie, deceased, by virtue of an appointment duly made by the Circuit Court of the State of Oregon for Klamath County, [2] and that such executor and the widow and the dependent daughter of plaintiff's decedent, at all times herein mentioned, were and are now bona fide residents, inhabitants and citizens of the State of Oregon and non-citizens of the State of California; that Shirley Lorraine Rankin is the duly appointed, qualified and acting executrix of the estate of John Gilbert Rankin, deceased, by virtue of an appointment duly made by the Superior Court of the State of California for Tulare County, and that said John Gilbert Rankin, at the time of the accident herein complained of, and each and every one of the defendants above named, were then, and at all times herein mentioned, and now are residents, inhabitants and citizens of the State of California, and that there is a diversity of citizenship existing between the plaintiffs and defendants herein.

III.

That more than the sum of Three Thousand

(\$3,000.00) Dollars, exclusive of interest and costs, is involved in this action.

IV.

That at all times herein mentioned, the defendants, Rankin and Norswing, co-partners, doing business as RANKIN AVIATION INDUSTRY and/or RANKIN AERONAUTICAL ACADEMY, were the owners and operators of a certain Republic Amphibian Seabee Aircraft, Department of Commerce No. NC 6096K, and that the partner John Gilbert Rankin, in furtherance of the activities of said partnership, was the pilot thereof.

V.

That on or about the 23rd day of February, 1947, at about the hour of 2:50 o'clock in the afternoon of said day, said John Gilbert Rankin, operating said Seabee Airplane, took off from the Klamath Falls Airport at Klamath Falls, Klamath County, Oregon, with the plaintiff's decedent, John B. Elie as one of the passengers in said airplane; that said take-off executed by the said Rankin, as Pilot, and the subsequent flight was done in a careless, negligent and reckless manner, in that, at the time and place of said take-off and flight and under the conditions of the altitude [3] of the airport, the temperature, density and pressure of the air then existing, the defendants caused said airplane to be overloaded, and maneuvered the same in such manner as to cause said airplane to be flown into and against some high-power electric wires, or other obstructions, causing the same to crash into the ground, causing the demise of plaintiff's decedent.

VI.

That the defendants were careless, reckless and negligent in the operation of said aircraft in the following particulars, to-wit:

a. In attempting to take-off and fly said airplane when the same was over-loaded;

b. In failing to keep a proper, or any, lookout for obstructions in the path of the flight of said airplane, and to so maneuver said airplane as to avoid colliding with such obstructions;

c. In failing to keep said airplane under proper control;

d. By failing to cause said airplane to gain sufficient forward speed to permit the climbing of same;

e. By attempting to fly said airplane in a "nose high" attitude, and at a critical angle of attack, thereby causing the same to mush and become incapable of climbing above the objects on the terrain in the path of said flight;

f. By taking-off said airplane and attempting to fly same at or near the stalling speed;

g. That at all times and dates herein mentioned, there was in full force and effect, Civil Air Regulations of the Department of Commerce, Bureau of Aeronautics of the Government of the United States of America, inter alia, as follows, to-wit:

"§ 43.1010. Aircraft Operation Record. An aircraft for which an air worthiness certificate is currently in effect, shall not be operated unless there is attached to such [4] air worthiness certificate, an appropriate aircraft operation

record, prescribed and issued by the Administrator, nor shall such aircraft be operated other than in accordance with the limitations prescribed and set forth by the Administrator in such record. . . .”

That there was currently in effect for said Seabee aircraft, an air worthiness certificate and an aircraft operation record, prescribed and issued by the Administrator, which provided, inter alia, that said Seabee airplane was certificated under said Civil Air Regulations to be operated at a gross weight of not to exceed 3150 pounds. That at the time and place of said take-off and accident said aircraft was loaded and being operated by the defendants at a gross weight in excess of 3150 pounds, to-wit: more than 3489 pounds.

VII.

That the acts of carelessness, recklessness and negligence as hereinbefore alleged, and each thereof, were the proximate cause of the accident herein complained of; and of plaintiff's decedent's death.

VIII.

As a result of said accident, as aforesaid, the plaintiff's decedent, the said John B. Elie received injuries from which he died;

IX.

That at the time of his death, the said decedent left surviving him a widow, Matilda C. Elie, and a daughter, Jacqueline Elie; that the plaintiff in this action as executor and personal representative prosecutes this action for the benefit of said Matilda D. Elie, and Jacqueline Elie, as the surviving

widow and daughter, respectively, of decedent, by virtue of and pursuant to Section 8-903 Oregon Compiled Laws Annotated, as amended.

X.

That at the time of his death, the said John B. Elie [5] was 42 years of age, and an intelligent, industrious and dutiful husband and father, with a life expectancy of approximately 27.62 years.

XI.

That at the time of said accident, the decedent left surviving him his widow, Matilda C. Elie, of the age of 43 years, with a life expectancy of approximately 26.81 years, and his dependent daughter, Jacqueline Elie, of the age of 14 years, with a life expectancy of 51.89 years.

XII.

That prior to his death, the said John B. Elie was capable of earning, and, in fact, did have, an income of more than Five Hundred (\$500.00) Dollars per month out of which he supported his said widow and child.

XIII.

That by reason of the wrongful death of said John B. Elie, occasioned by the negligence of the defendants as aforesaid, the estate of said John B. Elie sustained a pecuniary loss and damage to its property, as hereinafter alleged, and the said Matilda C. Elie, his widow, and the said Jacqueline Elie, his dependent daughter, have been deprived of the care, aid and services of the said John B. Elie, all to their general damage in a sum greater than Ten Thousand (\$10,000.00) Dollars.

XIV.

That by reason of said wrongful death, the plaintiff was obliged to incur and pay funeral and burial expenses for the decedent to its special damages in the sum of \$470.00.

Wherefore, plaintiff demands judgment against the defendants, and each of them, for the sum of Ten Thousand (\$10,000.00) Dollars general damages, and for the further sum of \$470.00 special damages, and for its costs and disbursements herein [6] incurred.

/s/ JOHN B. EBINGER,
/s/ CHESTER E. McCARTY,
Attorneys for Plaintiff.

State of Oregon,
County of Klamath—ss.

I, Mary H. Crum, being first duly sworn depose and say that I am the Trust Officer of the The First National Bank of Portland, the plaintiff in the within entitled cause, and the foregoing complaint is true as I verily believe.

/s/ MARY H. CRUM.

Subscribed and sworn to before me this 16th day of February, 1948.

(Seal) /s/ BERYL TUCKER,
Notary Public for Oregon.

My Commission expires Aug. 11, 1950.

[Endorsed]: Filed Feb. 18, 1948. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
COMPLAINT

To: Gerald Bridges, Esq., 216 West Sixth Street,
Los Angeles, California; McCarty, Dickson &
Swindells, 700 Yeon Building, Portland, Ore-
gon; John B. Ebinger, U. S. National Bank
Building, Klamath Falls, Oregon, Attorneys for
the Plaintiff.

Please take notice that on Monday, the 5th day
of April, 1948, at 10 a.m. of said day, or as soon
thereafter as counsel can be heard, at the Court-
room of the Honorable Peirson M. Hall, Judge of
the above-entitled Court, in Courtroom No. 3, Fed-
eral Building, City of Los Angeles, State of Cali-
fornia, the above-named defendants and each [8]
of them will move the Court as follows:

I.

To dismiss the complaint on the ground that the
plaintiff has failed to state a claim against the
defendants upon which relief may be granted.

II.

To dismiss the complaint on the ground that the
plaintiff lacks capacity to sue.

III.

To dismiss the complaint on the ground that the

defendants and each of them lack capacity to be sued.

IV.

To dismiss the complaint on the ground of lack of jurisdiction over the subject matter.

This motion will be based upon this notice of motion, the complaint on file herein and the memorandum of points and authorities attached hereto.

Wherefore, the defendants and each of them pray that the complaint be hence dismissed.

Dated this 18th day of March, 1948.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR.

(Affidavit of service by mail attached.)

[Endorsed]: Filed March 22, 1948. [9]

In the District Court of the United States for the
Southern District of California, Northern
Division

No. 707-N.D.

THE FIRST NATIONAL BANK OF PORT-
LAND as executor of the estate of JOHN B.
ELIE, deceased, for and on behalf of the sur-
viving widow, MATILDA C. ELIE, and the
surviving daughter, JACQUELINE ELIE,
Plaintiffs,

v.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN and R. S. NORSWING, co-
partners, doing business under the assumed
name and style of RANKIN AVIATION IN-
DUSTRY; SHIRLEY LORRAINE RANKIN
as Executrix of the estate of JOHN GILBERT
RANKIN, deceased,

Defendants.

JUDGMENT

In this action the defendants, John Gilbert Ran-
kin and R. S. Norswing, co-partners, doing business
under the assumed name and style of Rankin Aero-
nautical Academy, and John Gilbert Rankin and
R. S. Norswing, co-partners, doing business under
the assumed name and style of Rankin Aviation
Industry; R. S. Norswing, individually, and Shir-
ley Lorraine Rankin as executrix of the estate of
John Gilbert Rankin, deceased, by their attorneys,

O'Connor & O'Connor, by William V. O'Connor, Esquire, 530 West Sixth Street, Los Angeles, California, having appeared and filed a motion to dismiss the plaintiffs' [11] amended complaint herein, and the issue of law thereto arising having been duly submitted to the Court by the defendants, and having come on to be heard before this Honorable Court, and the Court, being fully advised in the premises, good cause appearing therefor, did, heretofore, to-wit, on the 24th day of May, 1948, order that the said motion of the defendants to dismiss the said amended complaint in the above-entitled case be granted;

Now, therefore, it is ordered, adjudged and decreed that judgment be entered in favor of the defendants and each of them, and that the plaintiffs take nothing by this action, and that said defendants and each of them have and recover their costs herein.

Dated this 3rd day of June, 1948.

/s/ PEIRSON M. HALL,

United States District Judge.

Approved as to form, pursuant to Rule 7 of the Local Rules, So. Dist. of California, this 3rd day of June, 1948.

/s/ GERALD BRIDGES,

Attorney for Plaintiffs.

Judgment entered June 3, 1948. Docketed June 3, 1948. Book 4, Page 354. Edmund L. Smith, Clerk.

[Endorsed]: Filed June 3, 1948. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that the above named plaintiff hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 3, 1948.

GERALD BRIDGES,
Of Attorneys for Appellant.

[Endorsed]: Filed June 22, 1948. [13]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

The above named parties, through their respective counsel, do hereby stipulate and designate for inclusion in the Record on Appeal the following:

I.

Complaint for Damages for Wrongful Death filed February 18, 1948, as amended by interlineation pursuant to Order of Court on May 3, 1948. [14]

II.

Notice of Motion to Dismiss Complaint filed March 22, 1948.

III.

Judgment filed June 3, 1948.

IV.

Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed June 22, 1948.

V.

This Stipulation designating contents of record on appeal.

Dated: July 21, 1948.

GERALD BRIDGES,
CHESTER E. McCARTY,
JOHN B. EBINGER,

By /s/ GERALD BRIDGES,
Attorneys for Plaintiff and Appellant.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR,
Attorneys for Defendants and Respondents.

[Endorsed]: Filed July 24, 1948. [15]

In the District Court of the United States, Southern
District of California, Northern Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain full, true and correct copies of Complaint; Notice of Motion to Dismiss Complaint; Judgment; Notice of Appeal and Stipulation Designating Record on Appeal which constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing,

comparing, correcting and certifying the foregoing record amount to \$4.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26th day of July, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11996. United States Circuit Court of Appeals for the Ninth Circuit. The First National Bank of Portland, as Executor of the Estate of John B. Elie, Deceased, for and on behalf of the surviving widow, Matilda C. Elie, and the surviving daughter, Jacqueline Elie, Appellant, vs. John Gilbert Rankin and R. S. Norswing, Co-partners, doing business under the assumed name and style of Rankin Aeronautical Academy John Gilbert Rankin and R. S. Norswing, Co-partners, d.b.a. Rankin Aviation Industry; R. S. Norswing, Individually, and Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed July 27, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11996

THE FIRST NATIONAL BANK OF PORT-
LAND, as executor of the estate of JOHN G.
ELIE, deceased, for and on behalf of the surviv-
ing widow, MATILDA C. ELIE and the sur-
viving daughter, JACQUELINE,
Plaintiff,

v.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN and R. S. NORSWING, co-
partners, doing business under the assumed
name and style of RANKIN AVIATION IN-
DUSTRY; R. S. NORSWING, individually,
and SHIRLEY LORRAINE RANKIN, as ex-
ecutrix of the estate of JOHN GILBERT
RANKIN, deceased,
Defendants.

APPELLANT'S POINTS ON APPEAL AND
DESIGNATION OF RECORD
POINTS RELIED ON BY APPELLANT

I.

The law of the State of Oregon provides a sub-
stantive right of action for damages resulting from
wrongful death which survives the deceased and
also survives the death of the wrongdoer and an

action for damages resulting from such wrongful death may be maintained by the personal representative of the deceased against the personal representative of the deceased wrongdoer.

II.

The law of the place of wrong governs rights of action arising from wrongful death.

III.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the deceased.

IV.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the death of the wrongdoer.

V.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, if by the law of the State where the wrong took place such right exists.

VI.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, against the personal representative of the deceased wrongdoer in the State of the forum, if by the law of the State where the wrong took place such right exists against the personal representative of the deceased wrongdoer.

VII.

The law of the State of Oregon provides that an action for damages resulting from wrongful death must be brought by the personal representative (executor or administrator) of the deceased for the benefit of the surviving spouse and dependents of the deceased.

VIII.

If the law of the State where the wrongful death took place designates a particular representative to sue, such representative may bring such action in the District Court, having jurisdiction, in any State, as the owner of a claim in trust for certain distributees.

IX.

The law of the State of Oregon provides that the measure of damages in an action resulting from the wrongful death of a person, is the pecuniary loss suffered by the estate of the deceased.

X.

The law of the State of California provides that the personal representative of any person may maintain an action against the executor or administrator of a deceased wrongdoer who in his lifetime has wasted or destroyed the estate of such person by his wrongful death.

XI.

The pecuniary loss suffered by the estate of a deceased by reason of the wrongful death of such deceased is a waste and destruction of the estate of such deceased by the wrongdoer within the pur-

view of Section 574 of the Probate Code of the State of California.

XII.

A cause of action based on tort is not such a claim under the law of the State of California as must be presented to and rejected by the executor or administrator of the deceased wrongdoer as a condition precedent to and filing of an action thereon.

XIII.

When a cause of action for tort exists against co-partners, the liability of the partners is joint and several and the death of the partner who committed the tortious act does not relieve the surviving partner of liability nor abate an action against him based thereon.

DESIGNATION OF RECORD

Appellant designates the entire record as certified to by the Clerk of the District Court.

GERALD BRIDGES,
McCARTY, DICKSON &
SWINDELLS,
JOHN B. EBINGER,

By /s/ JOHN B. EBINGER,
Attorneys for Appellant.

(Verified.)

[Endorsed]: Filed Aug. 3, 1948. Paul P. O'Brien,
Clerk.

No. 11997

United States
Circuit Court of Appeals

for the Ninth Circuit

MILTON JAMES SCOTT THOMPSON,
Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, Co-partners, doing business as Rankin
Aeronautical Academy, JOHN GILBERT RAN-
KIN and R. S. NORSWING, Co-partners, d.b.a.
Rankin Aviation Industry; R. S. NORSWING,
Individually, and SHIRLEY LORRAINE RAN-
KIN, as Executrix of the Estate of John Gilbert
Rankin, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

FILED
AUG 26 1948

PAUL P. O'BRIEN

No. 11997

United States

Circuit Court of Appeals

for the Ninth Circuit

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, Co-partners, doing business as Rankin
Aeronautical Academy, JOHN GILBERT RAN-
KIN and R. S. NORSWING, Co-partners, d.b.a.
Rankin Aviation Industry; R. S. NORSWING,
Individually, and SHIRLEY LORRAINE RAN-
KIN, as Executrix of the Estate of John Gilbert
Rankin, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record ing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

GERALD BRIDGES,
215 West Sixth Street,
Los Angeles 14, California.

McCARTHY, DICKSON & SWINDELLS,
700 Yeon Building,
Portland 4, Oregon.

L. ORTH SISEMORE,
Stewart-Drew Building,
Klamath Falls, Oregon.

For Appellees:

O'CONNOR & O'CONNOR,
530 West Sixth Street,
Los Angeles 14, California. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California, Northern Division.

Civil No. 708

MILTON JAMES SCOTT THOMPSON,

Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, Co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN as executrix of the estate of JOHN GILBERT RANKIN, deceased,

Defendants.

COMPLAINT

Plaintiff for cause of action against the defendants and each of them, alleges:

I.

That at all times herein mentioned, the plaintiff was and is now a bona fide resident, inhabitant and citizen of the State of Oregon, and a non-citizen of the State of California; that Shirley Lorraine Rankin is the duly appointed, qualified and acting executrix of the estate of John Gilbert Rankin, deceased, by virtue of an appointment duly made by

the Superior Court of the State of California for Tulare County, and that said John Gilbert Rankin, at the time of the accident herein complained of, and each and every one of the defendants above named, were then, and at all times herein mentioned, and now are residents, inhabitants and citizens of the State of California, and that there is a diversity of citizenship existing between the plaintiff and defendants herein. [2]

II.

That more than the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs is involved in this action.

III.

That at all times herein mentioned, the defendants, Rankin and Norswing, co-partners, doing business as Rankin Aviation Industry and/or Rankin Aeronautical Academy, were the owners and operators of a certain Republic Amphibian Seabee Aircraft, Department of Commerce No. NC 6096K, and that the partner John Gilbert Rankin, in furtherance of the activities of said partnership, was the pilot thereof.

V.

That on or about the 23rd day of February, 1947, at about the hour of 2:50 o'clock in the afternoon of said day, said John Gilbert Rankin, operating said Seabee Airplane, took off from the Klamath Falls Airport at Klamath Falls, Klamath County, Oregon, with the plaintiff as one of the passengers in said airplane; that said take-off executed by the said Rankin, as Pilot, and the subsequent flight was

done in a careless, negligent and reckless manner, in that, at the time and place of said take-off and flight and under the conditions of the altitude of the airport; the temperature, density and pressure of the air then existing, the defendants caused said airplane to be overloaded, and maneuvered the same in such manner as to cause said airplane to be flown into and against some high-power electric wires, or other obstructions, causing the same to crash into the ground, causing the injuries to this plaintiff as are more specifically hereinafter set out.

VI.

That the defendants were careless, reckless and negligent in the operation of said aircraft in the following particulars, to-wit:

(a) In attempting to take-off and fly said airplane when the same was overloaded; [3]

(b) In failing to keep a proper, or any, lookout for obstructions in the path of the flight of said airplane, and to so maneuver said airplane as to avoid colliding with such obstructions;

(c) In failing to keep said airplane under proper control;

(d) By failing to cause said airplane to gain sufficient forward speed to permit the climbing of same;

(e) By attempting to fly said airplane in a "nose high" attitude, and at a critical angle of attack, thereby causing the same to mush and become incapable of climbing above the objects on the terrain in the path of said flight;

(f) By taking-off said airplane and attempting to fly same at or near the stalling speed.

(g) That at all times and dates herein mentioned, there was in full force and effect, Civil Air Regulations of the Department of Commerce, Bureau of Aeronautics of the Government of the United States of America, *inter alia*, as follows, to-wit:

“§ 43.1010. Aircraft Operation Record. An aircraft for which an air worthiness certificate is currently in effect, shall not be operated unless there is attached to such air worthiness certificate, an appropriate aircraft operation record, prescribed and issued by the Administrator, nor shall such aircraft be operated other than in accordance with the limitations prescribed and set forth by the Administrator in such record. . . .”

That there was currently in effect for said Seabee aircraft, an air worthiness certificate and an aircraft operation record, prescribed and issued by the Administrator, which provided, *inter alia*, that said Seabee airplane was certificated under said Civil Air Regulations to be operated at a gross weight of not to [4] exceed 3150 pounds. That at the time and place of said take-off and accident, said aircraft was loaded and being operated by the defendants at a gross weight in excess of 3150 pounds, to-wit: more than 3489 pounds.

VII.

That the acts of carelessness, recklessness and negligence as hereinbefore alleged, and each thereof,

were the proximate cause of the accident herein complained of, and of the injuries sustained by the plaintiff as hereinafter set out.

VIII.

That plaintiff was badly battered, bruised, torn, crushed, mangled and maimed by said accident receiving, among others, the following injuries:

(a) A concussion of the brain and injury and damage thereto.

(b) A compound fracture of both of the large bones in the right forearm.

(c) Dislocation of the radio-ulner joint, with loss of motion.

(d) A fracture of one of the large bones of the left forearm at the wrist.

(e) A crushed left hand with permanent distortion, deformity and disability.

As a result thereof, it was necessary to cut away a portion of the bone and tissue of said right arm, and set said fractures, and to place both arms in casts. Plaintiff was rendered unconscious, and remained in an unconscious condition for a period of three days, and in a semi-conscious condition for a period of about one week thereafter; that it was necessary to re-set the fracture of the plaintiff's right arm, which was done about two weeks following said accident; that as a result of the injuries received as aforesaid, plaintiff developed pneumonia in both lungs, for which he underwent treatment and hospitalization, for more than a month; that plaintiff's arms and hand are permanently deformed, and that he is permanently incapacitated on

account of said accident [5] as aforesaid; that the head of the right radius of plaintiff's forearm was forcibly driven downward and lodged beneath the skin on the outer side of the elbow, causing excruciating continuing pain, and an unsightly deformity. That the injuries to plaintiff herein set out, caused him excruciating pain and suffering, and continues to cause him excruciating pain and suffering. That plaintiff still is undergoing treatment and is informed and believes and therefore states that other surgery as a result of said accident is necessary and must be performed in the future. All to plaintiff's general damage in the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars.

IX.

That prior to the accident herein complained of, the plaintiff was gainfully employed in the operation of his own profitable automotive business in the City of Klamath Falls, Oregon, and that by reason of said accident, and as a proximate result thereof, plaintiff was unable to attend his said business for a period of three months, to his special damage in the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars; that on account of said accident and injuries, plaintiff was required to, and in fact, did employ the services of a physician and surgeon, and incurred hospital, ambulance, and nurses' bills, in the total sum of approximately One Thousand Five Hundred Ninety-One Dollars and Seventy-Five Cents (\$1,491.75), all to his further special damages in the sum of One Thousand Five Hundred Ninety-One Dollars and Seventy-Five Cents (\$1,591.75).

Wherefore, plaintiff demands judgment against the defendants, and each of them, for the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars general damages, and for the further sum of Nine Thousand Ninety-One Dollars and Seventy-Five Cents (\$9,091.75) as special damages, and for his costs and disbursements [6] herein incurred.

/s/ L. ORTH SISEMORE,
/s/ CHESTER E. McCARTY,
of McCarty, Dickson & Swindells,
Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Feb. 18, 1948. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
COMPLAINT

To Gerald Bridges, Esq., 216 West Sixth Street, Los Angeles, California; McCarty, Dickson & Swindells, 700 Yeon Building, Portland, Oregon; L. Orth Sisemore, Esq., Suite 213 Stewart-Drew Bldg., 731 Main Street, Klamath Falls, Oregon, Attorneys for Plaintiff.

Please Take Notice that on Monday, the 5th day of April, 1948, at 10 a.m. of said day, or as soon thereafter as counsel can be heard, at the Courtroom of the Honorable Peirson M. Hall, Judge of the above-entitled Court, in Courtroom No. 3, Federal Building, City of Los Angeles, State of California,

the above-named defendants and each [8] of them will move the Court as follows:

I.

To dismiss the complaint on the ground that the plaintiff has failed to state a claim against the defendants upon which relief may be granted.

II.

To dismiss the complaint on the ground that the defendants and each of them lack capacity to be sued.

III.

To dismiss the complaint on the ground of lack of jurisdiction over the subject matter.

This motion will be based upon this notice of motion, the complaint on file herein and the memorandum of points and authorities attached hereto.

Wherefore, the defendants and each of them pray that the complaint be hence dismissed.

Dated this 18th day of March, 1948.

O'CONNOR & O'CONNOR,
By /s/ WILLIAM V. O'CONNOR,
Attorneys for Defendants.

(Acknowledgment of Service by Mail.)

[Endorsed]: Filed March 22, 1948. [9]

In the District Court of the United States for
The Southern District of California, Northern
Division.

Civil Action No. 708-N.D.

MILTON JAMES SCOTT THOMPSON,
Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN, and R. S. NORSWING, co-
partners, doing business under the assumed name
and style of RANKIN AVIATION INDUS-
TRY; R. S. NORSWING, individually, and
SHIRLEY LORRAINE RANKIN as execu-
trix of the estate of JOHN GILBERT RAN-
KIN, deceased,

Defendants.

JUDGMENT

In this action the defendants, John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the assumed name and style of Rankin Aeronautical Academy, and John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the assumed name and style of Rankin Aviation Industry; R. S. Norswing, individually, and Shirley Lorraine Rankin as executrix of the estate of John Gilbert Rankin, deceased, by their attorneys, O'Connor & O'Connor, by William V. O'Connor, Esq., 530

West Sixth Street, Los Angeles, California, having appeared and filed a motion to dismiss the plaintiff's complaint herein, and the issue of law thereto arising having been duly submitted to the Court by the defendants, and having come on to be heard before this Honorable Court, and the Court, being fully advised in the premises, good [11] cause appearing therefor, did, heretofore, to wit, on the 24th day of May, 1948, order that the said motion of the defendants to dismiss the said complaint in the above-entitled case be granted;

Now, Therefore, It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendants and each of them, and that the plaintiff take nothing by this action, and that said defendants and each of them have and recover their costs herein.

Dated this 3rd day of June, 1948.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form, pursuant to Rule 7 of the Local Rules, So. Dist. of California, this 3rd day of June, 1948.

/s/ GERALD BRIDGES,
Attorney for Plaintiff.

Judgment entered June 3, 1948. Docketed June 3, 1948. Book 4, Page 356. Edmund L. Smith, Clerk.

[Endorsed]: Filed June 3, 1948. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS UNDER RULE 73(b)

Notice is hereby given that the plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 3, 1948.

GERALD BRIDGES,
Of Attorneys for Appellant.

[Endorsed]: Filed June 22, 1948. [13]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

The above named parties, through their respective counsel, do hereby stipulate and designate for inclusion in the Record on Appeal the following:

I.

Complaint for Damages for Wrongful Death filed February 18, 1948, as amended by interlineation pursuant to Order of Court on May 3, 1948.

II.

Notice of Motion to Dismiss Complaint filed March 22, 1948. [14]

III.

Judgment filed June 3, 1948.

IV.

Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed June 22, 1948.

V.

This Stipulation designating contents of record on appeal.

Dated July 21, 1948.

CHESTER E. McCARTY,
L. ORTH SISEMORE,
GERALD BRIDGES,

By /s/ GERALD BRIDGES,
Attorneys for Plaintiff and
Appellant.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR,
Attorneys for Defendants and
Respondents.

[Endorsed]: Filed July 24, 1948. [15]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain full, true and correct copies of Complaint; Notice of Motion to Dismiss Complaint; Judgment; Notice of Appeal and Stipulation Designating Record on Appeal which constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$4.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26th day of July, A.D. 1948.

(Seal)

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11997. United States Circuit Court of Appeals for the Ninth Circuit. Milton James Scott Thompson, Appellant, vs. John Gilbert Rankin and R. S. Norswing, Co-partners, doing business as Rankin Aeronautical Academy, John Gilbert Rankin and R. S. Norswing, Co-partners, d.b.a. Rankin Aviation Industry; R. S. Norswing, Individually, and Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed July 27, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11997

MILTON JAMES SCOTT THOMPSON,

Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN and R. S. NORSWING, co-
partners, doing business under the name and
style of RANKIN AVIATION INDUSTRY;
R. S. NORSWING, individually, and SHIR-
LEY LORRAINE RANKIN as executrix of
the estate of JOHN GILBERT RANKIN, de-
ceased,

Defendants.

POINTS RELIED ON BY APPELLANT

I.

Under the laws of the State of Oregon actions for wrongful death and injuries to the person survive against the personal representatives of the wrongdoer's estate and create a substantive right of action which is not abated by the death of the wrongdoer.

II.

The law of the place of wrong determines whether a claim for damages for a tort survives the death of the tortfeasor or the injured person.

III.

If a claim for damages for injuries survives the death of the injured person or the wrongdoer, as the case may be, by the law of the place of wrong, recovery may be had upon it, by or against the representatives of the decedent.

IV.

Under the laws of the State of California actions for damages sounding in tort survive against the personal representatives of the wrongdoer's estate.

V.

A cause of action based upon tort is not such a claim under the laws of California as must be presented to and rejected by the personal representative of the deceased wrongdoer prior to instituting suit.

VI.

When a cause of action for tort exists against co-partners, the liability of the partners is joint and several and the death of the partner who committed the tortious act does not relieve the surviving partner of liability nor abate an action against him based thereon.

DESIGNATION OF RECORD

Appellant designates the entire record as certified to by the Clerk of the District Court.

L. ORTH SISEMORE,
GERALD BRIDGES and
McCARTY, DICKSON &
SWINDELLS,

By /s/ L. ORTH SISEMORE,
Attorneys for Appellants.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 3, 1948. Paul P. O'Brien,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the
Estate of LANIER SARLES WALLAN, De-
ceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
co-partners, etc., R. S. NORSWING, individual-
ly, and SHIRLEY LORRAINE RANKIN, as
Executrix, etc.,

Appellees.

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE,
Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, etc., et al,

Appellees.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, etc., et al,

Appellees.

APPELLANTS BRIEF

SEP 2 1948

Upon Appeal from the District Court of the United
States for the Southern District of California
Northern Division



United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

NO. 11995

MARGIE LEE WALLAN, as Administratrix of the
Estate of LANIER SARLES WALLAN, De-
ceased, for and on behalf of the surviving wid-
ow, MARGIE LEE WALLAN, and the surviving
daughters, BARBARA LEE WALLAN and
SUSAN JEANETTE WALLAN,
Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GILBERT
RANKIN and R. S. NORSWING, co-partners,
d. b. a. RANKIN AVIATION INDUSTRY; R. S.
NORSWING, individually, and SHIRLEY LOR-
RAINE RANKIN, as Executrix of the Estate of
JOHN GILBERT RANKIN, Deceased,
Appellees.

APPELLANTS BRIEF

Upon Appeal from the District Court of the United
States for the Southern District of California
Northern Division

United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

NO. 11996

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE, De-
ceased, for and on behalf of the surviving wid-
ow, MATILDA C. ELIE, and the surviving
daughter, JACQUELINE ELIE,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY; JOHN GILBERT
RANKIN and R. S. NORSWING, co-partners,
d. b. a. RANKIN AVIATION INDUSTRY; R. S.
NORSWING, individually, and SHIRLEY LOR-
RAINE RANKIN, as Executrix of the Estate of
JOHN GILBERT RANKIN, Deceased,

Appellees.

APPELLANTS BRIEF

Upon Appeal from the District Court of the United
States for the Southern District of California
Northern Division

United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

NO. 11997

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business as RAN-
KIN AERONAUTICAL ACADEMY, JOHN
GILBERT RANKIN and R. S. NORSWING, co-
TRY; R. S. NORSWING, individually, and
SHIRLEY LORRAINE RANKIN, as Executrix
of the Estate of JOHN GILBERT RANKIN, De-
ceased,

Appellees.

APPELLANTS BRIEF

Upon Appeal from the District Court of the United
States for the Southern District of California,
Northern Division

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STATEMENT OF JURISDICTIONAL FACTS

Jurisdiction of the District Court and of the United States Circuit Court of Appeals for the Ninth Circuit is founded on Section 24, Subd. (1), (b), of the Judicial Code, as amended, in that each of said actions is between citizens of different states, each plaintiff being a citizen of the State of Oregon and each defendant being a citizen of the State of California, and that in each action the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, the facts of jurisdiction being pleaded in the complaints filed in said actions, respectively, as set forth in the Transcripts of Record, pages 2, 3 and 4.

STATEMENT OF CASE

On February 23, 1947, in the State of Oregon, near the city of Klamath Falls, an airplane owned by John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the name and style of Rankin Aeronautical Academy and Rankin Aviation Industries, and operated by said John Gilbert Rankin in furtherance of said co-partnerships, crashed to the ground fatally injuring said Rankin and two of his passengers, Lanier Sarles Wallan and John B. Elie, and injuring the third passenger, Milton James Scott Thompson.

On February 18, 1948, Margie Lee Wallan, as administratrix of the estate of said Lanier Sarles Wallan, and the First National Bank of Portland, as executor of the Last Will and Testament of said John B. Elie, for the benefit of the respective surviving wid-

ows and children of said deceased, and Milton James Scott Thompson for himself, under and pursuant to Oregon law, filed respective actions in the District Court of the United States for the Southern District of California, Northern Division, being Civil Actions 706, 707 and 708, against said co-partnerships, said R. S. Norswing, individually, as surviving partner, and Shirley Lorraine Rankin, as executrix of the estate of said John Gilbert Rankin, deceased, for damages resulting from said deaths and injuries, respectively, said actions being based on negligence of said John Gilbert Rankin, Transcripts of Record, pp 2 to 8.

The defendants in each of said actions filed a motion pursuant to Rule 12, Federal Rules of Civil Procedure, to dismiss the complaint on the grounds, 1) that plaintiff has failed to state a claim upon which relief may be granted, 2) that the plaintiff lacks capacity to sue, 3) that the defendants and each of them, lack capacity to be sued, and 4) that the Court lacks jurisdiction over the subject matter. T. R., pp 9, 10.

At request of defendants' counsel it was stipulated that said motion be heard by the Central Division of said District Court.

On May 24, 1948, after hearing, the District Court made orders granting said motions as to each of said actions and on June 3, 1948, entered judgment in each of said actions for defendants. T. R., 10, 11, 12. From these judgments the respective plaintiffs appeal. T. R., 12, 13.

SPECIFICATIONS OF ERROR

The District Court erred in granting defendants' motions to dismiss and in entering judgments for defendants.

ARGUMENT

The District Court did not hand down an opinion nor make particular findings nor indicate the ground or grounds upon which said motions were granted and the judgments for defendants entered. Therefore, it must be presumed that the District Court based its orders and judgments upon **all** the grounds advanced in said motions, from which it follows that Appellants must show, in relation to said motions, that:

1. The respective complaints **state** claims upon which relief may be granted;
2. The respective plaintiffs **have** capacity to sue;
3. The defendants and each of them, **have** capacity to be sued;
4. The District Court **has** jurisdiction over the subject matter.

THE LAW

I

The United States District Courts have jurisdiction of civil actions for damages resulting from wrongful death or injuries to the person, between citizens of different States, where the matter in con-

trover exceeds, exclusive of interest and costs, the sum or value of \$3,000.

Judicial Code, Sec. 24; 28 U. S. C. A. 41 (1)

Holmes v. Oregon etc. R. Co., 5 Fed. 75, 6 Sawy 262

Minnehaha County, S. D., v. Kelley, 150 F 2d 356

Memphis Street Rlwy. Co. v. Moore, 243 U. S. 299, 37 S. Ct. 273

Mexican Central R. Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211

Section 24 of the Judicial Code, 28 U. S. C. A. 41 (1), as pertinent to this appeal, reads as follows:

“Section 41, (1) * * ; **civil suits at common law or in equity**. First. Of all suits of a civil nature, at common law or in equity,* where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and * * (b) is between citizens of different States, * *.”

COMMENT

That the United States District Courts have jurisdiction of all suits of a civil nature, at common law or in equity, in all cases where the jurisdictional amount and diversity of citizenship is present, including actions for damages for personal injuries or resulting from wrongful death, is so well established as to preclude comment and the fundamental jurisdictional law should not have been referred to at all except for the broad field opened by defendants' mo-

tions and the general conclusion of the District Court.

THE LAW

II

The law of the State of Oregon provides a substantive right of action for damages resulting from wrongful death which survives the deceased and may be maintained by the personal representatives of the deceased for the benefit of the widow and surviving dependents of the deceased.

Sec. 8-903, Oregon Compiled Laws Annotated.

Ross v. Robinson, 169 Or. 293; 124 P 2d 918

Ross v. Robinson, 169 Or. 314; 128 P 2d 956

Ross v. Robinson, 174 Or. 25; 147 P 2d 204

"Sec. 8-903. Action by personal representative for wrongful death: Limitations: Amount recoverable.

When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefore against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000."

COMMENT

In the *Ross v. Robinson* case, Ross, as administrator of the estate of Lyna M. Ross, brought action against Robinson for the wrongful death of his intestate under the statute above quoted. The Oregon Supreme Court said:

“The action is for death by wrongful act, and the right to bring it is conferred by Section 8-903. O. C. L. A., which reads as follows: (Sec-8-903 as above is then set forth verbatim)”

THE LAW

III

Under the laws of the State of Oregon actions for damages for injuries to the person or resulting from wrongful death survive against the personal representatives of the wrongdoer and create a substantive right of action which is not abated by the death of the wrongdoer.

Sec. 8-904, Oregon Compiled Laws Annotated.

In Re Vilas Estate

Vilas et al v. Harala, 166 Or. 122; 110 P 2d 940, 943

“Section 8-904. Survival of cause of action arising out of injury to person or death after death of wrongdoer: Amount recoverable.

Causes of action arising out of injury to the person or death, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal repre-

sentatives of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; provided, however, that the injured person shall not recover judgment except upon some competent satisfactory evidence other than the testimony of said injured person; and provided further, that the damages recoverable under the provisions of this act shall not exceed \$10,000."

COMMENT

In *Re Vilas Estate*, *supra*, the Oregon Supreme Court, quoting Sec. 8-904 as above set forth, upheld the appointment by an Oregon court of an administrator for the estate of a deceased wrongdoer for the purpose of enabling the person injured in Oregon in an automobile accident caused by the alleged negligence of the deceased wrongdoer, to maintain an action against such administrator for damages for such injuries under said statute.

Both Sections 8-903 and 8-904, O. C. L. A., were in full effect at the time of all the events mentioned in the complaints filed in said actions and are still in effect.

THE LAW

IV

The law of the place of wrong governs rights of action arising from wrongful death or injuries to the person.

Restatement, Conflict of Laws, Secs. 391, 378, 379, 384

Tennessee Coal, I & R C. v. George, 233 U. S.

354; 34 S. Ct. 587

Spokane & I E. R. Co. v. Whitely, 237 U. S. 487; 35 S. Ct. 655

V

The law of the place of wrong determines whether an action for damages for injuries to the person or arising from wrongful death survives the deceased and the death of the wrongdoer.

Restatement, Conflict of Laws, Sec. 390

Ormsby v. Chase, 290 U. S. 387; 54 S. Ct. 211

Gray v. Blight, 112 F. 2d 696, 698

VI

An action for damages for injuries to the person or resulting from wrongful death may be maintained in the United States District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, if by the law of the State where the wrong took place such right exists, and such action may be maintained against the personal representatives of the deceased wrongdoer and may be brought by the personal representatives of the deceased injured, if by the law of the State where the wrong took place such right exists and such right is capable of enforcement in the State of the forum and is not offensive to its public policy.

Judicial Code, Sec. 24; 28 U. S. C. A. 41 (1)
supra

Rule 17 (b), Federal Rules of Civil Procedure
Minnehaha County, S. D., v. Kelley, 150 F. 2d 356

Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183; 52 S. Ct. 84

Memphis Street R. Co. v. Moore, 243 U. S. 299; 37 S. Ct. 273

Mexican Central R. Co. v. Eckman, 187 U. S. 429; 23 S. Ct. 211

COMMENT

The law set forth in Paragraphs IV to VI appears too well established to require argument or comment.

THE LAW

VII

Under the law of the State of Oregon an action for damages resulting from wrongful death must be brought by the personal representative (executor or administrator) of the deceased for the benefit of the surviving widow or widower and dependents of the deceased or if none survive then for the benefit of the estate of the deceased.

Sec. 8-903, Oregon Compiled Laws Annotated, *supra*

Ross v. Robinson, 169 Or. 314; 128 P. 2nd 956

COMMENT

The Oregon Supreme Court, in **Ross v. Robinson**, 128 P. 2d 956, gist 957, enunciates the firmly established law as to who must bring the action:'

"By force of the Statute (Sec. 8-903), an action brought for damages caused by the wrongful act or omission of another must be instituted by the personal representative of the deceased, for any bene-

ficiary. This statute is definite and certain as to when an action may be maintained by the personal representative of the decedent for the benefit of the decedent's estate. It specifies that, in case there is no widow or widower, or surviving dependents, then (the personal representative may maintain an action) for the benefit of the estate of the deceased'. The right of action is statutory and is granted to the personal representative for the benefit of those specified in the statute in the order therein named. It is only in the event of the nonexistence of preferred beneficiaries that there is a right of action in favor of other beneficiaries."

THE LAW

VIII

If the law of the State where the wrongful death took place designates a particular representative to sue, such representative may bring such action in the United States District Court, having jurisdiction, in any State, as the owner of a claim in trust for certain distributees.

Restatement, Conflict of Laws, Secs. 394, 396, c.
Cooper v. American Airlines, Inc., 149 F. 2d 355

COMMENT

Restatement, Conflict of Laws, distinguishes the representative capacity in suits of this nature from the common law rule that an administrator can sue only in the state of his appointment, expressing the better reasoned and applicable rule in Sec. 396 c, as follows:

“c. Where particular representative named in statute. If the death statute of the state of wrong names a particular representative to sue, such as the representative appointed in the state of wrong or the representative at the domicil of the deceased, such representative is the only person who can sue; but such representative may sue in any state as the owner of a claim in trust for certain distributees. The case then comes under the rule stated in Sec. 394.”

In **Cooper v. American Airlines, Inc.**, *supra* an executrix appointed in the State of Kentucky brought an action for wrongful death in the United States District Court for the Southern District of New York. On defendant's motion, the court dismissed the complaint on the ground that plaintiff lacked capacity to sue in the courts of New York and therefore under Rule 17 (b), Federal Rules of Civil Procedure, lacked capacity to sue in the United States District Court in New York. The United States Circuit Court of Appeals for the Second Circuit in reversing the lower court posed the question as follows:

“Under New York ‘law’ is there an exception to the general rule (precluding suit by a foreign personal representative) when that representative sues for wrongful death occurring in another State whose death statute constitutes the representative a nominal plaintiff vested with a cause of action for the sole benefit of specified persons?”

and held that:

“Under Kentucky ‘laws’ the executrix here is ‘merely a nominal plaintiff’ and ‘the real parties of interest are the beneficiaries whom (she) represents.’ If those beneficiaries had been permitted to and had brought suit in their own names, unquestionably their action would not have been ousted. To reach a different conclusion because the nominal plaintiff is a ‘representative’ appointed by a court of another state would be to wrest judgment, irrationally, on the sheerest verbalism.”

Appellants submit that this is the sound and just rule and to hold otherwise would be to cut off rights of innocent victims of negligent wrongdoers and to shock the comity policy among the states which Beale, *Conflict of Laws*, Vol. 3, 1651, refers to as:

“There is, moreover, in the law of every jurisdiction a strong policy in favor of recognizing and enforcing rights and duties created by a foreign law.”

THE LAW

IX

Under the law of the State of California a right of action exists for damages resulting from wrongful death which survives against the personal representatives of the deceased wrongdoer and representatives of a deceased meeting wrongful death are permitted to sue the representatives of the deceased wrongdoer for damages resulting from such wrongful death.

Hunt et al v. Authier, 28 Cal. 2d 288; 169 P. 2d 913

Nash v. Wright,.....Cal. App. 2d.....; 186 P. 2d. 691

COMMENT

The case of **Hunt et al v. Authier**, *supra*, provides the authority under California law permitting plaintiffs to bring these actions in their representative capacity against the personal representatives of the deceased wrongdoer. In the **Hunt** case, the widow for herself and as guardian of the three minor children of the deceased brought action against the personal representative of the deceased wrongdoer, for damage to property and estate of the deceased, **Hunt**, and for the pecuniary loss suffered by the widow and minor children. The California Supreme Court construed and applied Section 574 of the Probate Code of California, as amended in 1931, which is quoted in the opinion as follows:

“Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use the property of the testator or intestate in his lifetime, or committed any trespass on the real property of the decedent in his lifetime: and any person or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the property of any

such person, or committed any trespass upon the real property of such person.”

and stated :

“Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from the decedent by the commission of the wrongful act is as much a destruction or injury to property as was involved in the foregoing cases; and the tort likewise in this case should be deemed to be an invasion of their property rights within the meaning of the present statute. Where the courts have not held such losses to be injuries to property, **it has been due to a reluctance to depart from ancient judicial declarations or to the absence of a statute designed to modify the old rule of non-survival.**

The legislature has definitely spoken, by the amendment of our statute, so as to enlarge the class of property rights and interests which shall receive protection in the event of the death of the wrongdoer. Where the legislature has so provided, the court should not countenance a tortious deprivation of property without redress.

“It follows that wherever a plaintiff has sustained an injury to his ‘estate’, whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to ‘property’ within the meaning of that word in the present statute.”

“The plaintiffs have therefore stated a cause of

action for recovery from the defendants, of the material losses sustained, including the present value of future support from their decedent considering their respective normal life expectancies, but exclusive of any damages for such items as loss of consortium, comfort or society of the decedent."

In *Nash v. Wright*, *supra*, the California Appellate Court again recognized the rule that an action for wrongful death may be maintained in California against the personal representative of the deceased tort-feasor, the question arising upon an appeal from an order granting plaintiff's motion substituting the executor of a deceased tort-feasor as a party defendant. The court followed the decision of the Supreme Court of California in the case of *Hunt v. Authier*, *supra*, and quoted from the opinion:

"(1) that upon the death of Doctor Hunt a cause of action for wrongful death arose in favor of his heirs under Section 377, Code of Civil Procedure, and (2) that it continued to exist until the tort-feasor's death, but (3) that upon his death the **survival of the action against the tort-feasor's estate was effected by virtue of Section 574 of the Probate Code which affords the right to maintain action after the death of those who could have been plaintiffs or defendants if they had lived, in cases of injury to property, and to that extent has created a departure from the common law rule that actions ex delicto do not survive.**"

THE LAW

X

The right of action for damages for injuries to the person or resulting from wrongful death created and surviving under Oregon law is capable of being enforced under California law and is not offensive to the public policy of the State of California.

Hunt et al v. Authier, 28 Cal. 2d 288; 169 P. 2d 913

Nash v. Wright,.....Cal. App. 2d.....; 186 P. 2nd 691

COMMENT

The legislature of the State of California by the enactment of Sec. 574 of the Probate Code of California, as amended, and the Supreme Court of California by its construction and application of said statute in the **Hunt** case, *supra*, have enunciated the public policy of the State of California, for its own citizens, to be that an action for injuries or wrongful death resulting in pecuniary loss (injury to property or estate) to the wronged, survives both the wronged and the wrongdoer and may be brought by the personal representatives of the wronged against the personal representatives of the wrongdoer, and the enforcement, at the instance of an Oregon citizen, of a right of action under Oregon law designed to accomplish the same end is not offensive to the public policy of the State of California.

The nature of the remedy provided by Secs. 8-903 and 8-904, O. C. L. A., *supra*, as construed and

applied by the highest court of Oregon, and Sec. 574 of the Probate Code of California, as construed and applied by the highest court of California, with respect to redress for damages resulting from wrongful death, is practically the same, and accomplishes and is designed to accomplish the same ultimate end, which is to provide redress to the surviving widow or widower and dependents for the pecuniary loss to their estate resulting from the wrong.

The measure of damages recoverable in cases involving wrongful death is the same under both laws. In Oregon it is defined as "the pecuniary loss suffered", "to repair in a pecuniary way the losses sustained by the beneficiaries of the action", "the pecuniary benefits which the beneficiary might reasonably be expected to have derived from the decedent had his life not been terminated", **Hansen v. Hayes**, 175 Or. ~~870~~³⁴⁸; 154 P. 2d 202, **214**, "the amount the deceased * * would have accumulated as net savings at the time of his (natural) death", "the amount of pecuniary assistance and support which they (beneficiaries) might have reasonably expected to receive from the deceased had he lived", **Nordlund v. Lewis & Clark R. Co.**, 141 Or. 83; 15 P. 2d 980, **983**. In California in the **Hunt** and the **Nash** cases, *supra*, it is defined as "the support * * which they (widow and children) would have received from their decedent", "the material losses sustained, including * * future support from their decedent", and the injuries suffered are referred to as "lessening of their estate" and a "deprivation of their pecuniary interest" and "future support". This comparison leads to but one

conclusion, that the injury or damage sought to be redressed by the laws of both states is the loss to the "estates" of the decedent's beneficiaries. Laws so similar, having like purpose and end, do not offend the public policy of either state, but to the contrary offer remedial measures, each to the other.

With reference to No. 11997, the case wherein Appellant Thompson seeks to obtain damages for personal injuries, we respectfully direct the Court's attention to the modern trend of numerous recent decisions holding that if under the laws of the state where the cause of action arose it would survive the death of the wrongdoer the cause of action may, even after the death of the wrongdoer, be enforced in another state, and although under the laws of such other state it would have abated.

Chubbock v. Holloway, (1931) 182 Minn. 225; 234 N. W. 314, 868

Burgess v. Gates, 20 Vt. 326

Stratton Independent v. Dines, 126 F. 968; 135 F. 449 Certiorari denied; 197 U. S. 623; 49 L. Ed. 911; 25 S. Ct. 800

Kerston v. Johnson, (1932) 185 Minn. 591; 242 N. W. 329; 85 A. L. R. 1

Burg v. Knox, (1933) Mo.; 67 S. W. (2nd) 96

Rose v. Phillips Packing Co., 21 F. Supp. 485

Under the statute of Oregon a cause of action for injury to the person survives the death of the tort-

feasor. Section 8-904 O. C. L. A. *supra*. Hence at the time of the injury the plaintiff Thompson became vested with a definite right. The right of action against the personal representative of the deceased Rankin was and is property. He has now applied to a Court of law for aid in realizing on that right.

The situation is analogous to that in the case of **Chubbock v. Holloway**, *supra*, wherein the plaintiff's cause of action arose in Wisconsin and by virtue of the statutes of that state survived the death of the wrongdoer. An action was brought in the State of Minnesota under the laws of which state the cause of action abated on the death of the wrongdoer. The Court of the State of Minnesota said in part:

"Plaintiff has suffered a loss through decedent's wrongful act. The law of Wisconsin gives him a remedy. Our public policy is not such as to prompt us in turning him from our door and relegating him to a foreign state where the defendant, perchance, having no property, could not be reached.....The public policy of the forum cannot, without any regard for logic or general principal of justice, be violated by the enforcement of a vested right created by the law of a foreign state. Especially is this so when there is, as here, nothing repugnant to good morals, and no violation of fundamental principles of justice."

In **Rose v. Phillips Packing Co.**, *supra*, the District Court holds:

“In this connection it may be noted that the modern tendency of judicial authority is to disregard the differences between the various forms of Lord Campbell’s Act as expressed in the several state statutes; and indeed there is now very substantial authority for the view that the *lex loci delicti* may be sued on extra territorially even where the state of the forum has no similar statute at all.”

It would appear from the above cited cases that where the law sought to be enforced does not **violate** the public policy of the state of the forum the Courts of the forum should be open to the injured party for the redress of wrongs.

Hunt v. Authier, supra, declares the public policy of California is not against maintaining an action for wrongful death on the theory that the wrongful killing damaged the estate. It would appear that the survival of a cause of action for personal injury resulting in damages to the injured party should be no more repugnant to the public policy of the State of California than would the survival of a cause of action for damages resulting from wrongful death.

We therefore contend that the District Court should in all justice, give full effect to the transitory nature of tort actions and permit the injured party to pursue the right of action given him under the laws of the State of Oregon.

THE LAW

XI

A cause of action based on tort is not such a claim under the law of the State of California as must be presented to and rejected by the executor or administrator of the estate of the deceased wrongdoer as a condition precedent to the filing of an action thereon.

Thompson v. Byers, 116 Cal. App. 214, 218

Kagee v. Bencich, 27 Cal. App. 2d 469, 472

COMMENT

It is noted that in both the **Hunt** and **Nash** cases, *supra*, claims were filed with the executor or administrator of the estates of the deceased wrongdoers under the Probate Law of California and rejected before suit was filed. No claims were filed in the instant cases. The law of the State of California does not require filing or rejection of a claim based on tort. In **Thompson v. Byers**, *supra*, an action for conversion, the court held:

“The claim in this action was one arising in tort, It follows that it was not necessary to prepare and file with the executrix for allowance or otherwise, any claim. There is no statute requiring the presentation of such a claim to the executrix.”

In **Kagee v. Bencich**, *supra*, a later case likewise an action for conversion, the court held:

“The conversion constitutes a tort, and the only cases in which a claim is required to be filed are those arising upon contract.” (Citing **Thompson v. Byers**)

THE LAW

XII

The members of a partnership are jointly and severally liable to respond in damages for injury or resulting from wrongful death caused by the tortious act of one of the partners when acting in the general scope of the partnership business.

Section 79-305, Oregon Compiled Laws Annotated

Section 79-307, Oregon Compiled Laws Annotated

California Civil Code, Section 2409

McIntyre v. Kavanaugh, 242 U. S. 138; 61 L. Ed. 205; 37 S. Ct. 38

Dixon v. Haynes, 146 Wash. 163; 262 P. 119; 55 A. L. R. 1218

Where the liability for injury to the person is joint and several, the death of one of the persons liable does not bar an action against the other.

Sayles v. Peters, 11 Cal. App. 2nd 401; 54 Pac. 2nd 94

Lee v. Deasy, 19 Cal. App. 2nd 667; 66 P. 2d 175

National Automobile Ins. Co. v. Cunningham, 41 Cal. App. 2nd 828; 107 P. 2d 643

Hess v. Lowrey, 122 Ind. 225; 22 N. E. 156; 7 L. R. A. 90

COMMENT

The defendant, R. S. Norswing, being a partner of John Gilbert Rankin and the tortious acts of John Gilbert Rankin having been alleged to have been "in furtherance of the activities of said partnership" (Tr 11995, p 4; 11996, p 4; 11997, p 3) it follows under the provisions of Sections 79-305 and 79-307, O. C. L. A., *supra*, and California Civil Code, 2409, *supra*, the liability of defendant R. S. Norswing is joint and several. **McIntyre v. Kavanaugh**, *supra*; **Dixon v. Haynes**, *supra*.

The liability, being joint and several, became fixed on the defendant, R. S. Norswing, at the instant of the tortious act and was not abated by the death of the tort-feasor. If, for the sake of argument, the view were taken that no cause of action survives against the personal representative of the deceased tort-feasor, still under the authority of **Sayles v. Peters**, *supra*; **Lee v. Deasy**, *supra*; **National Automobile Ins. Co. v. Cunningham**, *supra*, and **Hess v. Lowrey**, *supra*, the causes of action and the right to bring same survives against the defendant, R. S. Norswing.

CONCLUSION

In the light of the law and authorities cited, which Appellants submit as controlling, the subject matter of the actions and the allegations contained in the complaints, it is obvious that:

1. The respective complaints state claims upon which relief may be granted ;
2. The respective plaintiffs have capacity to sue ;
3. The defendants and each of them have capacity to be sued ;
4. The District Court has jurisdiction over the subject matter ; and that the District Court erred in granting the motions to dismiss and entering judgments for defendants.

Respectfully submitted,

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No's. 11995, 11996, 11997

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 11995.

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER
SARLES WALLAN, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, etc., R. S.
NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as
Executrix, etc.,

Appellees.

No. 11996.

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the
Estate of JOHN B. ELIE, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.*,

Appellees.

No. 11997.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.*,

Appellees.

APPELLEES' BRIEF.

Appeal From the District Court of the United States
for the Southern District of California,
Northern Division

OCT 25 1948

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No. 11995.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, for and on behalf of the surviving widow, MARGIE LEE WALLAN, and the surviving daughters, BARBARA LEE WALLAN and SUSAN JEANNETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, copartners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

Appellees.

APPELLEES' BRIEF.

Appeal From the District Court of the United States
for the Southern District of California,
Northern Division

No. 11996.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE, De-
ceased, for and on behalf of the surviving widow,
MATILDA C. ELIE, and the surviving daughter,
JACQUELINE ELIE,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
copartners, doing business under the assumed name and
style of RANKIN AERONAUTICAL ACADEMY;
JOHN GILBERT RANKIN and R. S. NORSWING,
copartners, d.b.a. RANKIN AVIATION INDUS-
TRY; R. S. NORSWING, individually, and SHIR-
LEY LORRAINE RANKIN, as Executrix of the
Estate of JOHN GILBERT RANKIN, Deceased,

Appellees.

APPELLEES' BRIEF.

Appeal From the District Court of the United States
for the Southern District of California,
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No. 11997.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
copartners, doing business as RANKIN AERONAU-
TICAL ACADEMY; JOHN GILBERT RANKIN
and R. S. NORSWING, copartners, d.b.a. RANKIN
AVIATION INDUSTRY; R. S. NORSWING, in-
dividually, and SHIRLEY LORRAINE RANKIN, as
Executrix of the Estate of JOHN GILBERT RAN-
KIN, Deceased,

Appellees.

APPELLEES' BRIEF.

Appeals From the District Court of the United States
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No. 11997.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.*,
Appellees.

APPELLEES' BRIEF.

I.

Preliminary Statement.

On or about the 23rd day of February, 1947, at about
the hour of 2:50 o'clock in the afternoon of the said day,
an airplane operated by John Gilbert Rankin and owned
by the Rankin Aeronautical Academy and/or the Rankin

Aviation Industries, copartnerships, of which one Robert S. Norswing was the copartner, took off from the Klamath Falls Airport in the City of Klamath Falls, State of Oregon, and shortly after the take-off crashed to the ground fatally injuring the pilot Rankin, as well as two of his fellow passengers, John B. Elie and Lanier Sarles Wallan, and injuring the fourth passenger, Milton James Scott Thompson.

As a result of this accident, three complaints were filed in the court below, being Civil Actions Nos. 706 and 707 [R. 11995, pp. 2-9; R. 11996, pp. 2-9], which were filed by the personal representatives of the deceased passengers duly appointed by the Circuit Court of the State of Oregon, suing for and on behalf of the surviving widows and children, the gist of said actions being for wrongful death and damage to property; and Civil Action 708 [R. 11997, pp. 2-9], which was filed by the surviving injured passenger, the gist of said action being for personal injuries.

In all three actions the parties defendant were the same:

- (1) R. S. Norswing, individually and as surviving copartner of John Gilbert Rankin;
- (2) Shirley Lorraine Rankin, as Executrix of the estate of John Gilbert Rankin, appointed by the Superior Court of Tulare County, California;
- (3) John Gilbert Rankin and R. S. Norswing, copartners, doing business under the assumed name and style of Rankin Aeronautical Academy and/or Rankin Aviation Industries.

Motions to dismiss these complaints were filed by the defendants under Rule 12 of the new Federal Rules of Civil Procedure challenging the existence of a claim upon

which relief could be granted; capacity of the parties to sue and be sued and lack of jurisdiction over the subject matter. [R. 11995, 11996, pp. 9-10; R. 11997, pp. 8-9.]

The court below entered judgments sustaining these motions [R. 11995, 11996, pp. 11-12; R. 11997, pp. 10-11], from which judgments the appellants appealed. [R. 11995, 11996, p. 13; R. 11997, p. 13.] A stipulation by counsel for the respective parties was approved by the court consolidating the three cases for the purposes of this appeal.

II.

Statement of the Case.

The motions to dismiss challenged the sufficiency of the well-pleaded allegations of the amended complaints and raised several issues of law.

First, the allegations showed that the plaintiffs in Civil Actions Nos. 706 and 707 [R. 11995, 11996] were foreign administrators and executors appointed by the Circuit Court of the State of Oregon for Klamath County, and citizens and residents of that State; while the defendants were citizens and residents of the State of California. Do the plaintiffs have sufficient legal capacity to institute suit in the District Court of the United States for the Southern District of California?

Second, the allegations showed that the defendant Shirley Lorraine Rankin was sued as the executrix of the estate of her husband, John Gilbert Rankin, appointed by the Superior Court of the State of California. Does the defendant Shirley Lorraine Rankin have sufficient legal capacity to be sued in the said Federal Court?

Third, the allegations showed that the defendant R. S. Norswing was sued not as a joint tortfeasor but individually and as a surviving copartner of the alleged tortfeasor who perished in the accident. May suit be maintained for wrongful death and negligence against a partner of the alleged tortfeasor who died in the commission of the alleged tort?

Fourth, the allegations showed that the accident complained of occurred in the State of Oregon, while suit thereon was filed in the District Court of the United States for the Southern District of California. What law is to govern, the *lex loci delicti* or the *lex fori*, and what is the applicable law of the respective jurisdictions?

III.

Summary of Argument.

- A. THE LAW OF THE FORUM GOVERNS AS TO ALL MATTERS PERTAINING TO REMEDIAL AS DISTINGUISHED FROM SUBSTANTIVE RIGHTS.
- B. THE CAPACITY OF AN EXECUTOR OR ADMINISTRATOR TO SUE OR BE SUED IS GOVERNED BY THE LAW OF THE FORUM.
- C. BY THE LAW OF THE FORUM, ACTIONS FOR WRONGFUL DEATH AND FOR TORT ABATE WITH THE DEATH OF THE TORTFEASOR.
- D. NO SUIT MAY BE MAINTAINED FOR WRONGFUL DEATH OR FOR NEGLIGENCE AGAINST A SURVIVING COPARTNER OF THE ALLEGED TORTFEASOR WHO DIED IN THE COMMISSION OF THE ALLEGED TORT.

ARGUMENT.

A. The Law of California Governs as to All Matters Pertaining to Remedial Rights.

The substantive rights of the parties to this action are governed by the law of the place where the right was acquired or the liability was incurred which constitutes the claim or cause of action. On the other hand, the law of the jurisdiction in which relief is sought controls as to all matters pertaining to remedial as contradistinguished from substantive rights.

Gray v. Blight, 112 F. 2d 696 (C. C. A. 10th, 1940);

Muir v. Kessinger, 35 Fed. Supp. 116 (D. C. Wash., 1940);

In re Vilas' Estate, 166 Ore. 124, 110 P. 2d 940 (1941);

Woollen v. Lorenz, 68 App. D. C. 389, 98 F. 2d 261 (1938);

In re Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301;

Cf. Herzog v. Stern, 264 N. Y. 379, 191 N. E. 23, *certiorari denied* 293 U. S. 597 (1934).

Section 390 of the Restatement, Conflict of Laws, summarizes this rule in this language:

“(b) If a claim for damages for injury survives the death of the injured person or the wrongdoer, as the case may be, by the law of the place of wrong, recovery may be had upon it by or against the repre-

representative of the decedent, provided the law of the state of forum permits the representative of the decedent to sue or be sued on such a claim. Without such power created by the law of the state of suit, no recovery can be had."

In *Gray v. Blight, supra*, the plaintiffs, citizens of the State of Texas, brought an action against the administrators of the deceased tortfeasor, a citizen of Colorado, for personal injuries and for damages to an automobile arising out of a collision which occurred in the State of Nevada and as a result of which the tortfeasor perished. Under the laws of the State of Nevada a suit for personal injuries did not abate by reason of the death of the wrongdoer but survived against his legal representatives. Under the law of the State of Colorado, in the Federal Court of which State the complaint was filed, the cause of action did not survive but abated by reason of the death of the wrongdoer. The defendant administrators filed a motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. The lower court sustained this motion and the decision was affirmed on appeal. The Circuit Court of Appeals for the Tenth Circuit used this language at page 697:

"The substantive rights of the parties to an action are governed by the *lex loci*, that is, the law of the place where the right was acquired or the liability was incurred which constitutes the claim or cause of action. [Citing cases in footnote.] Under the laws of Nevada a cause of action for personal injuries,

whether suit has been brought thereon or not, is not abated by reason of the death of the wrongdoer, but survives against his legal representatives . . . It follows that the cause of action survived the death of Blight. On the other hand, the law of the jurisdiction in which relief is sought controls as to all matters pertaining to remedial, as distinguished from substantive rights." [Citing cases in footnote.]

In *Muir v. Kessinger, supra*, the plaintiff minor, a citizen of Montana, was injured in Montana through the alleged negligence of the tortfeasor who died as a result of the accident. The tortfeasor was a citizen and resident of the State of Washington and the defendant was the administratrix of his estate. The common law rule prevails in Washington and a cause of action for tort under the Washington law does not survive. Under the law of the State of Montana where the action arose, there was a survival statute. This action was instituted in the United States District Court for the Eastern District of Washington. The defendant moved to dismiss for lack of jurisdiction, for the reason that recovery depended not upon the laws of the State of Montana but upon those of the State of Washington, and that under the laws of the State of Washington the cause of action did not survive. The motion to dismiss was granted.

In *Herzog v. Stern*, 264 N. Y. 379, 191 N. E. 23, *certiorari denied*, 293 U. S. 597, action was brought in New York to recover for personal injuries sustained by the plaintiff through the negligence of the defendant's testator

in an automobile accident which occurred in Virginia. Both the plaintiff and the testator were residents of New York at the time of the action, and the estate was being administered in that State. Under the laws of the State of Virginia such an action survived the death of the wrongdoer, while the law of New York provided no procedural machinery under which such an action could be maintained against an executor. The New York Court refused to entertain the action and said:

“The question, however, is not whether the cause of action created by the laws of the State of Virginia survives the death of the wrongdoer, but whether the law of this State permits the representative of the deceased wrongdoer to be sued on such a claim. . . . At common law a claim for personal injury did not survive and could not be enforced out of the property or against the personal representatives of the deceased wrongdoer. The common law has in this regard not been changed by the Legislature. . . . Where neither common law nor a statute permits the bringing of an action against executors or administrators of a deceased resident, the courts of this State are without jurisdiction to pass upon such a cause of action. . . . The rights and obligations of executors and administrators appointed by our courts are defined by our law and our courts are without jurisdiction to grant a judgment binding on the executors or administrators appointed here unless our law makes provision for such actions against executors and administrators. Each State may define the rights and obligations of those who come within its territorial bounds and comity will ordinarily cause the sister states to permit the enforce-

ment of such rights and obligations against their residents by resort to their courts, but no state has any power to provide that such rights and obligations may be enforced out of the property of a deceased wrongdoer in the possession of executors or administrators appointed by the courts of another State. Here comity does not determine the jurisdiction of the courts of the decedent's domicile."

In re Vilas' Estate, 166 Ore. 124, 110 P. 2d 940 (1941), the Supreme Court of the State of Oregon recognized and applied the rule that the law of the forum in which relief is sought controls in all matters pertaining to remedial rights. In that case a resident of the State of Oregon was injured in an automobile accident which occurred in that State as a result of the negligence of a resident of the State of Washington who died in the accident. In Oregon an action for damages resulting from wrongful death survives the death of the wrongdoer, while under the law of the State of Washington the right to maintain such an action abates upon the death of the tortfeasor. The Oregon Court said:

"The law of the forum in which relief is sought controls, however, in all matters pertaining to remedial rights, and under the Washington law the right to maintain an action for unliquidated damages founded on the tort of the decedent dies with the tortfeasor. *Compton v. Evans*, 200 Wash. 125, 93 P. 2d 341. . . . Therefore, Bonnie Simms could not maintain in Washington an action against the administrator of the estate of Robert John Vilas, deceased." (Citing cases.)

B. The Capacity of an Executor or Administrator to Sue or Be Sued Is Governed by the Law of the Forum.

Under Rule 17(b) of the new Federal Rules of Civil Procedure, the capacity of an individual other than one acting in a representative capacity to sue or be sued shall be determined by the law of his domicile. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the District Court is held. Therefore, under this rule the capacity of an executor or administrator to sue or be sued shall be determined by the law of the State of California.

Federal Rules of Civil Procedure, Rule 17(b),
Title 28, U. S. C., Sec. 723c;

Cooper v. American Airlines, 149 F. 2d 355 (C. C.
A. 2d, 1945), 162 A. L. R. 318;

Buttson v. Arnold, 4 F. R. D. 492 (D. C. Pa.,
1945);

Kleckner v. Lehigh Valley Rd. Co., 36 Fed. Supp.
600 (D. C. N. Y., 1940);

Waltz v. Chesapeake & Ohio Ry. Co., 65 Fed. Supp.
913 (D. C. Ill., 1946);

Martineau v. Eastern Airlines, 64 Fed. Supp. 235
(D. C. Ill., 1946);

Rejsenhoff v. Colonial Navigation Co., 35 Fed.
Supp. 577 (D. C. N. Y., 1940);

Ballard v. United Distilleries Co., 28 Fed. Supp.
633 (D. C. Ky., 1939).

C. By the Law of the Forum Actions for Wrongful Death and for Negligence Abate With the Death of the Tortfeasor.

1. THE DOCTRINE OF CLARK V. GOODWIN.

In California, the right to maintain an action for wrongful death or for personal injuries abates with the death of the wrongdoer and no action may be maintained thereon. Section 377 of the California Code of Civil Procedure is the wrongful death statute of this State, and this section authorizes an action only against the person causing the death. Ever since the decision of *Clark v. Goodwin*, 170 Cal. 527 (1915), by the highest Court of this State, our courts have held that such actions abate upon the death of the wrongdoer. In *Clark v. Goodwin*, an action was instituted by the plaintiff against the personal representatives of the deceased wrongdoer to obtain damages for wrongful death. The complaint showed on its face that the deceased wrongdoer had died prior to the commencement of the action. A demurrer was interposed to the complaint which was sustained by the lower court and affirmed by the Supreme Court of the State of California, the Court holding that the cause of action for wrongful death did not survive the death of the wrongdoer. The Court interpreted Section 377 of the California Code of Civil Procedure in this manner:

“The action provided is, by the very words of the section, one ‘*against the person* causing the death, or if such person be employed by another person who is responsible for his conduct, then also against *such other person*.’ Nowhere in our statute is there any intimation that such an action may be brought against any other person or persons than those so specified. It appears to follow irresistibly that as to such an

action the common law rules as to abatement of personal actions by death remain unimpaired in this state. . . . The authorities are uniform in supporting the conclusion we have reached that under such statutes as ours the cause of action for damages for the death of her husband given plaintiff by Section 377 of the Code of Civil Procedure, abated with the death of the alleged wrongdoer prior to action brought, and that such action cannot be maintained against his personal representatives.”

See also:

Singley v. Bigelow, 108 Cal. App. 436, 291 Pac. 899 (1930);

De La Torre v. Johnson, 200 Cal. 754, 254 Pac. 1105 (1927);

Severns v. California Highway Indemnity Exchange, 100 Cal. App. 384, 280 Pac. 213 (1929);

Hunt v. Authier, 28 Cal. 2d 288 (1946), 169 P. 2d 913, 171 A. L. R. 1379.

2. THE DOCTRINE OF HUNT V. AUTHIER.

In 1946, by a divided count, the Supreme Court of this State in the controversial case of *Hunt v. Authier*, 28 Cal. 2d 288, 169 P. 2d 913 (1946), 171 A. L. R. 1379, engrafted a qualification upon the rule laid down by the *Clark v. Goodwin* case.

Section 574 of the Probate Code of the State of California provides that executors and administrators may maintain an action against any person who has “wasted, destroyed, taken or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person or the personal

representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away or converted to his own use, the property of any such person or committed any trespass on the real property of such person.” The question arose in the *Hunt v. Authier* case as to whether the injury suffered by the plaintiff in the unlawful killing of her husband was such an injury to property within the meaning of this section as to survive the death of the wrongdoer. In this case the widow and minor children of the deceased filed a claim against the estate of the wrongdoer for waste and destruction of their property, property rights and estate. The claim was rejected and the action was filed. The action was not brought under the wrongful death statute, for the reason that the wrongdoer was dead at the time the action was commenced. The plaintiffs relied solely on Section 574 of the Probate Code. The Supreme Court of this State held that as the wrongful killing of a person effects a lessening of the estate of his widow and children and an invasion and deprivation of their pecuniary interest and right to future support from the decedent, such tort amounts to an evasion of their property rights so as to entitle them to maintain an action therefor against the personal representatives of the tortfeasor under Section 574 of the Probate Code.

The Court in the *Hunt v. Authier* decision was cautious not to disturb the law of this State as applied to the abatement of causes of action for personal injuries and wrong-

ful death as distinguished from injuries to property. At the outset of the opinion this admonition was clearly given:

“This action was not brought under the wrongful death statute (Code Civ. Proc., §377), for the obvious reason that the wrongdoer was dead at the time the action was commenced. . . . Such an action, in the absence of statutory provision for its survival, has been held to abate upon the death of the tort feisor (*Clark v. Goodwin*, 170 Cal. 527 . . .) Upon the death of Dr. Hunt a cause of action for wrongful death arose on behalf of the plaintiffs under Section 377 and continued to exist until the tort feisor’s death.”

In the *Hunt* case, the action was by a local guardian against a local administratrix as authorized by a local statute (Sec. 574, Probate Code). The redress for injury to property as authorized by Section 574 of the California Probate Code is not available to a foreign executor or administrator.

3. A FOREIGN ADMINISTRATOR OR EXECUTOR CANNOT MAINTAIN SUIT IN THIS STATE.

A foreign representative cannot, by virtue of his appointment, administer upon an estate in California. Although this is statutory, the rule is only declarative of the common law.

Section 1913 of our Code of Civil Procedure provides that:

“. . . the authority . . . of an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority.”

See also:

Estate of Rawitzer, 175 Cal. 585 (1917);

McCully v. Cooper, 114 Cal. 258 (1896);

Cortelyou v. Imperial Land Co., 166 Cal. 14 (1913);

21 Am. Jur., p. 852;

65 A. L. R., p. 563.

The plaintiffs (in Civil Actions Nos. 706 and 707 below), as executors and administrators appointed by the Oregon Circuit Court, are enjoined by the same statutory restriction and their letters lack extraterritorial force. The Oregon statute is almost word for word with our Section 1913 of the Code of Civil Procedure. See Oregon Laws, Section 2-723.

Therefore, the foreign administrators and executors cannot maintain their action under the Oregon wrongful death statute because the controlling law of the forum does not authorize such a suit and the ordinary rule of comity would not apply, for the reason that the Oregon survival statute is at war with the express statutory provision and general rule of law of this jurisdiction. (Cf. *McManus v. Red Salmon Co.*, 37 Cal. App. 133, 173 Pac. 1112 (1918); *Thome v. Macken*, 58 Cal. App. 2d 76, 136 P. 2d 116 (1943).) Nor may they prevail under Section 574 of our Probate Code, for the reason that their authority as personal representatives does not extend beyond the jurisdiction of the government under which they were invested with their authority.

Cf.:

Rybolt v. Jarrett, 112 F. 2d 642 (C. C. A. 4th. 1940);

Cooper v. American Airlines, 149 F. 2d 355 (C. C. A. 2d, 1945), 162 A. L. R. 313.

4. ACTIONS FOR PERSONAL INJURIES ABATE UPON THE DEATH OF THE WRONGDOER.

In Civil No. 708 below, the plaintiff sued for personal injuries sustained as a result of the alleged negligence of John Gilbert Rankin. The complaint showed on its face that the alleged tortfeasor had died prior to the institution of the action. [R. 11997, pp. 2-9.]

Again, we look to the law of the forum for the remedial rights of this plaintiff and the capacity of the defendants to be sued.

In California, as discussed hereinabove, a cause of action for personal injuries (like a cause for wrongful death) does not survive the death of the person who wrongfully or negligently brought about those injuries.

Clark v. Goodwin, 170 Cal. 527 (1915).

Although such an action may be maintained under Oregon law (Sec. 8-904, Oregon Laws), comity would not dictate that the courts of California afford a remedy to a citizen of Oregon which is not available to her own citizens, and where such a suit would offend the express law of this jurisdiction.

Cf.:

Chambers v. B. & O. R. R., 207 U. S. 142, 28 S. Ct. 54, 52 L. Ed. 143 (1907);

Spokane & I. E. R. Co. v. Whitley, 237 U. S. 487, 35 S. Ct. 655, 59 L. Ed. 1060 (1915).

5. THE LIABILITY OF THE DEFENDANT R. S. NORSWING.

The defendant R. S. Norswing was sued individually and as a copartner of the deceased tortfeasor. There were no allegations that this defendant was a joint tortfeasor.

Although the liability of partners for torts committed within the scope of the agency is joint and several (Sec. 2409, Civil Code of California), there is no survival provision in the Uniform Partnership Act which authorizes a suit against a partner of the alleged wrongdoer who dies in the commission of the tort. In the absence of a statutory provision for survival, actions in tort abate upon the death of the tortfeasor.

Clark v. Goodwin, supra;

Hunt v. Authier, supra.

Cf.:

Phillips v. Gonzales, 44 Cal. App. 2d 267, 112 P. 2d 272 (1941).

Even applying Oregon law as to the defendant Norswing, the plaintiffs cannot maintain their action: Section 8-904, Oregon Laws, authorizes a cause of action for personal injuries or wrongful death only "against the personal representatives of the wrongdoer." The defendant Norswing is not alleged to be within that statutory category.

The appellants in their brief (p. 23) assert the position that where the liability for injury to the person is joint and several the death of one of the persons liable does not bar an action against the other, and cite in support of that position the following cases:

Sayles v. Peters, 11 Cal. App. 2d 401, 54 P. 2d 94 (1936);

Lee v. Deasy, 19 Cal. App. 2d 667, 66 P. 2d 175 (1937);

National Automobile Ins. Co. v. Cunningham, 41 Cal. App. 2d 828, 107 P. 2d 643 (1941).

The above cases cited by the appellants have no bearing whatsoever on the issues involved here. The cases cited by the appellants involved actions brought under Section 402 of the California Vehicle Code. Under this Code section, when the owner of an automobile permits another to drive it any negligence of the driver is imputed to the owner. However, the cause of action against the driver of the car abates on his death, although such death does not bar the cause of action against the owner whose liability is primary up to \$5,000.00. Section 402 of the Vehicle Code does not speak on the subject of survival.

In *Phillips v. Gonzales*, 44 Cal. App. 2d 267, 112 P. 2d 272 (1941), the Court said:

“The plaintiff contends the doctrine stated in *De La Torre v. Johnson*, *supra* [200 Cal. 754], has been abrogated by section 402 of the Vehicle Code, St. 1937, p. 2353. However, a careful reading of that statute shows it does not speak on the subject of abatement and survival of actions against the estate of a deceased person.”

V.

Conclusion.

The judgments of the lower court sustaining the motions to dismiss the amended complaints should be affirmed.

Respectfully submitted,

O'CONNOR & O'CONNOR,

By WILLIAM V. O'CONNOR,

Attorneys for Appellees.

United States
Circuit Court of Appeals

For the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the
Estate of LANIER SARLES WALLAN, De-
ceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
co-partners, etc., R. S. NORSWING, individual-
ly, and SHIRLEY LORRAINE RANKIN, as
Executrix, etc.,

Appellees.

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE,
Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, etc., et al,

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MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, etc., et al,

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APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United
States for the Southern District of California
Northern Division

United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

No. 11995

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, for and on behalf of the surviving widow, MARGIE LEE WALLAN, and the surviving daughters, BARBARA LEE WALLAN and SUSAN JEANETTE WALLAN,
Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,
Appellees.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United States for the Southern District of California
Northern Division

United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

No. 11996

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE, De-
ceased, for and on behalf of the surviving wid-
ow, MATILDA C. ELIE, and the surviving
daughter, JACQUELINE ELIE,
Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
co-partners, doing business under the assumed
name and style of RANKIN AERONAUTICAL
ACADEMY, JOHN GILBERT RANKIN and
R. S. NORSWING, co-partners, d.b.a. RAN-
KIN AVIATION INDUSTRY; R. S. NOR-
SWING, individually, and SHIRLEY LOR-
RAINE RANKIN, as Executrix of the Estate of
JOHN GILBERT RANKIN, Deceased,
Appellees.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United
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United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

No. 11997

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

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co-partners, doing business as RANKIN AERO-
NAUTICAL ACADEMY, JOHN GILBERT
RANKIN and R. S. NORSWING, co-partners,
d.b.a. RANKIN AVIATION INDUSTRY; R. S.
NORSWING, individually, and SHIRLEY
LORRAINE RANKIN as Executrix of the Es-
tate of JOHN GILBERT RANKIN, Deceased,
Appellees.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United
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NO'S. 11995, 11996, 11997

In the

United States Court of Appeals

For the Ninth Circuit

No. 11995

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etc., et al.,

Appelles.

APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

For reply to appellees' brief filed herein, appellants submit the following additional authorities and argument, with respect to the points made by appellees:

I.

APPELLANTS' REPLY TO APPELLEES'
ARGUMENT "A":

Appellants' arguments with respect to the survival of appellants' causes of action against appellees, are contained in Proposition X, (pp. 17-21) of Appellants' Brief. Appellants' position is that the survival of a cause of action is a substantive right as distinguished from a procedural right and that, therefore, the general rule set for by appellees, with which we agree, is not applicable.

II.

APPELLANTS' REPLY TO APPELLEES'
ARGUMENT "B":

Appellants admit that the capacity of an executor or administrator to be sued is governed by the law of the forum.

III.

APPELLANTS' REPLY TO APPELLEES'
ARGUMENT "C":

1. The Doctrine of CLARK v. GOODWIN

The so-called doctrine of Clark v. Goodwin has been substantially weakened by the recent case of **MOFFAT v. SMITH**, 1948, 87 A.C.A. 877, 197 P. (2nd) 798. In this case, plaintiff sued seeking recovery of damages for injuries sustained in an automobile collision alleged to have been due to the negligence of one David D. Copenhaver. The latter having died subsequent to the accident, the action was brought against the executrix of his last will. Plaintiff's complaint alleged that he sustained injuries which would prevent him from carrying on his occupation as a chemical engineer, and from advancing in his profession as such; that he would otherwise be capable of earning large sums of money and that because of his injuries he had been deprived and will be deprived in the future of great gains and profits which he might otherwise have made to his damage in the sum of \$50,000. The defendant filed a demurrer to the complaint on the grounds that the plaintiff's cause of action abated with the death of Copenhaver. The court said:

"The only question presented here is did plaintiff's cause of action for future earnings abate with the death of the negligent tortfeasor."

The court then proceeded to quote at length from Section 574 of the Probate Code of California and the case of **HUNT v. AUTHIER**, and continued:

“And while in that case it was the right of the survivors of a decedent whose life had been taken by the action of the tortfeasor that was involved, it would be an anomaly to hold that their right to future support from their decedent constituted property within the provisions of Section 574, *supra*, but that the right of a surviving victim of the tort to his own future support is not. And when the court in the Hunt case said that when a plaintiff has sustained an injury to his “estate” whether in being or expectant, such injury is an injury to property, it laid down a rule which governs the case before us.”

The Hunt case changed the law with respect to survival of causes of action for tort in the State of California. It evidences a new “public policy”. By virtue of this case, the case of appellant Thompson for personal injuries (No. 11997) should survive against the estates of the deceased wrongdoers. In any event, those damages alleged in his case with respect to pecuniary loss may clearly be recovered from the estate of the deceased wrongdoer under the authority of **MOFFAT v. SMITH**.

2. The doctrine of HUNT v. AUTHIER

The statutes of Oregon by O.C.L.A. Sec. 8-904, provides an action for wrongful death which, as interpreted by the Supreme Court of the State of Oregon in the case of **HANSEN v. HAYES**, cited in appellants’ opening brief, allows damages measured by the pecuniary losses sustained by the benefi-

aries under the statute. The Statutes of California by Sec. 574 of its Probate Code, as interpreted by the Supreme Court of the State of California in the case of **HUNT v. AUTHIER** allows damages to any person who has suffered an injury or loss to his estate. There is no difference between the type of action for wrongful death as provided for Oregon and that provided for in California under Section 574.

3. A foreign administrator^{or} or executor cannot maintain suit in this state.

*Correction
gls E*

As a general statement of the law, appellees' statement is correct. This was the rule at common law, the courts giving as the reason therefor that to provide otherwise would lead to possible loss to creditors of the deceased at the forum, such foreign executor or administrator not being accountable to the courts of the forum for the application of proceeds.

But to this rule there have always been several exceptions. A foreign administrator may sue upon a claim which had accrued to himself as distinguished from a claim which accrued to his decedent.

Fox v. Tay, 89 Cal. 339, 24 P. 855, 857 (1890)

Reed v. Hollister, 95 Ore. 656, 188 P. 170
(1920)

Moore v. Petty, (CCA 8th, 1905) 135, Fed. 668,
674

Cramer v. Phoenix Mutual Life Ins. Co. of Hartford, Conn., (CCA 8th, 1937) 91 F. (2nd) 141,
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Turner v. Alton Banking and Trust Co., (CCA 8th, 1948) 166 F. (2nd) 305, 307

See also the following cases, cited by appellees:

Estate of Rowitzer, 175 Cal. 585, 587 (1917)

McCully v. Cooper, 114 Cal. 258, 261 (1896)

action
BB

Appellants' actions for wrongful death were not claims belonging to their respective decedents. They arose by virtue of the deaths. They are such causes of action as accrue to an executor or administrator in his individual capacity by force of the Oregon wrongful death statute. Appellants are merely statutory trustees for any funds that come into their hands by virtue of their prosecution of these actions. They do not administer the funds either for the benefit of the estate, the decedents' creditors, or the heirs and legatees of decedent. Any moneys recovered are turned over intact to the beneficiaries named in the statute. The widows and the minor children, not the plaintiff executor and administrator, the real parties in interest. (Cf. **NATWICK v. MOYER**, 177 Ore. 486, 496, 163 P. (2nd) 936, 940 (1945). The executor and administrator is only the tool used by the statute to effect recovery.

See also:

Pearson v. Norfolk & W. Ry. Co., (D.C. Va.) 286 F. 429, 431

Smith v. Bevins, (D.C. Md. 1944) 57 F. Supp. 760, 765

Dematei v. Missouri-Kansas-Texas Ry. Co., (1940) 345 Mo. 1136, 139 S. W. (2d) 504

LeMay v. Maddox (1946) 68 F. Supp. 25

Henkel v. Hood, (1945) 49 N. M. 45, 156 P. 2d 790

This precise point to appellants' knowledge has not been decided by the Supreme Court of either Oregon ~~and Washington~~ ^{or California} and appellants urge the adoption of the liberal rule to give full effect to the transitory nature of tort actions of this type.

*Correction
JDE*

4. Actions for personal injuries abate upon the death of the wrongdoer.

Appellants have discussed this doctrine under their discussion of the "Doctrine of **Clark v. Goodwin**", supra.

5. The liability of the defendant, R. S. Norswing.

In both Oregon and California, the liability of a partnership for torts committed by one of the partners within the scope of the partnership relations is joint and several.

Sec. 79-305, O.C.L.A.

Sec. 79-307, O.C.L.A.

Sec. 2407, Civil Code of California

Sec. 2409, Civil Code of California

Phillips v. Lyon, 109 Cal. App. 264, 270, 292 Pac. 711 (1930)

Armstrong v. New LaPax Coal Mining Company, 107 Fed. 2d 453

Warner v. DeArmond, 49 Or. 199; 89 Pac. 373

Kadota Fig Association of Producers v. Case-Swayne Co. (Calif.) 167 Pac. 2nd 518

Weaver v. Marcus, 165 Fed. 2nd 862; 175 A.L.R. 1305

Annotation 175 A.L.R. 1310

The death of one of the partners jointly and severally liable does not abate the cause of action against the surviving partner.

Kansas v. Winquist, 207 Minn. 315; 291 N. W. 294, 295 (1940)

Bartle v. Osburn (Wn.) 285 Pac. 425; 67 A.L.R. 1152

Rice v. VanWhy (Colo.) 111 Pac. 599

Phillips v. Gonzales, cited by appellees, is concerned with the liability of the executrix of the deceased tortfeasor, the Court holding the now discredited doctrine of **Clark v. Goodwin** that the action for personal injuries abated with the death of the tortfeasor, but with respect to the property damage to plaintiff's automobile allowed the action to survive against the executrix under the authority of Section 574 of the Probate Code of California. The case is not in point on the question of the tort liability of a surviving partner.

De La Torre v. Johnson cited by appellees is also concerned with the liability of an executrix for the tort of her deceased husband, and is not in point upon the liability of a surviving partner. In this

case, the court mentioned, as dicta, that if statutes created between the tortfeasor and another party a "sort of privity or quasi contractual relation" the action would survive against such other partner.

Norswing is not sued as a personal representative of the deceased tortfeasor but as a surviving partner who has a several liability, hence it follows that the death of the other tortfeasor is immaterial so far as the liability of the defendant Norswing is concerned.

CONCLUSION

The orders granting appellees' motion to dismiss appellants' complaints and entering judgment for appellees should be overruled and the judgment of the lower court reversed.

*Corrected
JBE*

Respectfully submitted,

GERALD BRIDGES

McCARTY, DICKSON &
SWINDELLS

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Attorneys for Appellants

Nos. 11995, 11996, 11997

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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SARLES WALLAN, Deceased, etc.,

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PETITION FOR REHEARING.

Upon Appeal From the District Court of the United States
for the Southern District of California,
Central Division

FILED

APR 7 - 1949

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CLERK

No. 11995

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Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, copartners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased.

Appellees.

PETITION FOR REHEARING.

Upon Appeal From the District Court of the United States
for the Southern District of California,
Central Division

No. 11996

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE, De-
ceased, for and on behalf of the surviving widow,
MATILDA C. ELIE, and the surviving daughter,
JACQUELINE ELIE,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
copartners, doing business under the assumed name and
style of RANKIN AERONAUTICAL ACADEMY;
JOHN GILBERT RANKIN and R. S. NORSWING,
copartners, d.b.a. RANKIN AVIATION INDUS-
TRY; R. S. NORSWING, individually, and SHIR-
LEY LORRAINE RANKIN, as Executrix of the
Estate of JOHN GILBERT RANKIN, Deceased,

Appellees.

PETITION FOR REHEARING.

Upon Appeal From the District Court of the United States
for the Southern District of California,
Central Division

No. 11997

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
copartners, doing business as RANKIN AERONAU-
TICAL ACADEMY; JOHN GILBERT RANKIN
and R. S. NORSWING, copartners, d.b.a. RANKIN
AVIATION INDUSTRY; R. S. NORSWING, indi-
vidually, and SHIRLEY LORRAINE RANKIN, as
Executrix of the Estate of JOHN GILBERT
RANKIN, Deceased,

Appellees.

PETITION FOR HEARING.

Upon Appeal From the District Court of the United States
for the Southern District of California,
Central Division

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Nos. 11995, 11996, 11997

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 11995.

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER
SARLES WALLAN, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, etc., R. S.
NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as
Executrix, etc.,

Appellees.

No. 11996.

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the
Estate of JOHN B. ELIE, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.*,

Appellees.

No. 11997.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.*,

Appellees.

PETITION FOR REHEARING.

I.

PRELIMINARY STATEMENT.

This Honorable Court reversed the judgments of the District Court of the United States in and for the Southern District of California, Northern Division, dismissing three suits filed by a foreign administratrix, a foreign executor and an individual citizen of Oregon, against a local executrix and the surviving copartner of the deceased

tortfeasor. The alleged tort was committed in the State of Oregon and two of the suits below were predicated on the wrongful death statutes of that jurisdiction, while the third suit was for personal injuries.

The suits were challenged below and on appeal on the grounds that the complaints failed to state a claim upon which relief could be granted, lack of capacity in the parties plaintiff to maintain the suits, lack of capacity of the parties defendant to be sued and lack of jurisdiction of the subject matter. [R. 11995, 11996, pp. 9-10; R. 11997, pp. 8-9.] This Honorable Court, in its opinion filed March 11, 1949, held that each of the plaintiffs was possessed with a cause of action maintainable against each of the defendants.

This petition for rehearing is respectfully filed on behalf of the defendant R. S. Norswing in each of the three causes of action and on behalf of the defendant Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, deceased, only as to No. 11997.

II.

STATEMENT OF THE CASE.

This petition for rehearing seeks to have this Honorable Court reconsider its opinion on two points of law: (1st) May suit be maintained for wrongful death and negligence against a surviving partner of the alleged tortfeasor who died in the commission of the tort? (2d) May suit for personal injuries be maintained against the executrix of the alleged wrongdoer in the State of California?

III.

SUMMARY OF ARGUMENT.

- A. NO SUIT MAY BE MAINTAINED FOR WRONGFUL DEATH OR FOR NEGLIGENCE AGAINST A SURVIVING PARTNER OF THE ALLEGED TORTFEASOR WHO DIED IN THE COMMISSION OF THE TORT.
- B. NO SUIT FOR PERSONAL INJURIES MAY BE MAINTAINED IN THE STATE OF CALIFORNIA AGAINST THE EXECUTRIX OF THE ALLEGED WRONGDOER.

IV.

ARGUMENT.

- A. No Suit May Be Maintained for Wrongful Death or for Negligence Against a Surviving Partner of the Alleged Tortfeasor Who Died in the Commission of the Tort.

This Honorable Court recognized the well-settled rule of law that since the tort complained of was committed in the State of Oregon, reference must be made to the applicable law of that jurisdiction to determine the substantive rights and liabilities of the parties. An examination of that law led this Court to conclude that the plaintiffs could prevail in suits for wrongful death and for personal injuries against the surviving copartner of the alleged tortfeasor who died in the commission of the tort. This conclusion was predicated upon the wrongful death statutes of the State of Oregon (Sec. 8-903 and Sec. 8-904, O. C. L. A.) and upon the Uniform Partnership Act in force in Oregon (Secs. 79-305, 79-307, 79-602, 79-603, 79-608, O. C. L. A.).

Liability of the Defendant R. S.
Norswing Under Wrongful Death
Statutes of the State of Oregon.

The Survival Statute of the State of Oregon (Sec. 8-904, O. C. L. A.) abrogates the common law rule that a personal right of action dies with the death of the tortfeasor. It designates the statutory defendants vulnerable to suit arising out of injury to the person or death. Under this statute, actions may be maintained only against "the personal representative of the wrongdoer." The applicable substantive law of the *lex loci delicti* gives no right of action against one not alleged to be the personal representative of the wrongdoer. Therefore, no cause of action against the defendant, R. S. Norswing, as the surviving partner of the deceased wrongdoer can be bottomed upon Sec. 8-904, O. C. L. A., without enlarging its scope and adding a class of defendants not specified in the statute. *Cf. Kramer v. San Francisco Market Street Rd. Co.*, 25 Cal. 434 (1864). The California wrongful death statute in effect at the time of the *Kramer* decision designated the "personal representatives of such deceased person" as the only persons who could institute such a cause of action. Stats. 1862, p. 447. In this case, an action was instituted by the father of a minor child who was killed by the alleged negligence of the defendant. A demurrer to the complaint was sustained below and affirmed on appeal, on the sole ground that the plaintiff was not within the statutory designation as the person entitled to maintain the suit. The Court said:

"The Act of 1862 is in derogation of the common law, and must, therefore, be strictly construed. The cause of action thereby created can be prosecuted only by the persons therein designated. The plaintiff does

not sue as the administrator or executor, but as the father and sole heir of the deceased person. That as 'father and heir' he cannot maintain this action, we have no doubt."

See, also:

Clark v. Goodwin, 170 Cal. 527 (1915).

Accordingly, the defendant R. S. Norswing, as the surviving copartner of the deceased wrongdoer, is not vulnerable to suit in Oregon under the survival statute of that State, for the obvious reason that he is not alleged to be "the personal representative of the wrongdoer." If liability is to attach at all as to the defendant R. S. Norswing, it must attach by reference to some other statute of the State of Oregon.

Liability of the Defendant

R. S. Norswing Under the Uniform Partnership Act.

The Uniform Partnership Act in force in Oregon provides that where by any negligence of a partner acting in the course of the business of the partnership loss or injury is caused to any person other than a partner, the partnership is liable to the same extent as the partner so acting; and all partners are liable jointly and severally for such wrongful act. (Secs. 79-305, 79-307, O. C. L. A.) This Honorable Court held that under these statutes a cause of action against a copartner survived the death of the partner alleged to be the tortfeasor.

The Uniform Partnership Act is silent on the subject of survival. In the absence of an express survival provision, it is respectfully submitted that no suit may be maintained against such a surviving partner. The authorities

cited in *Clark v. Goodwin*, *supra*, are but a few of the many which establish the settled rule of law that in the absence of an express statutory provision providing for survival, actions for wrongful death or personal injuries do not survive the death of the tortfeasor. There is no such express statutory provision in the Uniform Partnership Act and, therefore, no suit may be maintained against a surviving partner for wrongful death or for personal injuries upon the death of the alleged wrongdoer.

Sumner v. Brown, 312 Pa. 124, 167 Atl. 315 (1933).

In the above case the plaintiff was a guest in an automobile driven by Harry R. Brown and was injured in New York as a result of reckless driving. Harry R. Brown, the tortfeasor, was killed in the accident. At the time of this occurrence, Harry R. Brown was a partner of Arthur R. Brown and was engaged in partnership business. Prior to suit being filed, Arthur R. Brown died and the guest then sued in the State of Pennsylvania for personal injuries and joined as defendant "Edith M. Brown, Executrix of the Estate of Arthur R. Brown, surviving partner of Arthur R. Brown and Harry R. Brown, copartners." The plaintiff pleaded the New York Partnership Law, which is the identical provision as Sec. 79-305, O. C. L. A., and judgment was rendered for the defendant, which was affirmed on appeal by the Supreme Court of the State of Pennsylvania. The Court, in its opinion, said:

"Unless the law of New York provided a right of action for the tort, none exists; without a right of action, the suit must fail; if a right exists, it must

be pleaded. The provisions quoted from the partnership statute* do not provide for the continuation of the common-law liability for personal injury after death of the party liable. For the wrongful act of the partner who drove the car the property of the partnership was answerable (in the words of the statute) 'to the same extent as' he was; but his common-law liability had been terminated with his death. *Moe v. Smiley*, 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341. But, as agent for his copartner, his tort likewise made the property of the partnership answerable, but this liability also terminated by the death of the surviving partner. No right of action remains. . . . By the common law no recovery could be had against the estates of the joint and several tortfeasors."

Therefore, in the absence of an express statutory provision for survival in the Uniform Partnership Act the defendant R. S. Norswing may not be held liable for wrongful death or for personal injuries upon the death of the partner alleged to be the tortfeasor. Such causes of action abated upon the death of the wrongdoer.

*The New York statute construed in this case is Partnership Law of New York (Consolidated Laws, Ch. 39, Sec. 24), which is as follows:

"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

This Section is word for word with the Oregon statute, Sec. 79-305, O. C. L. A.

B. No Suit for Personal Injuries May Be Maintained in the State of California Against the Executrix of the Alleged Wrongdoer.

In this petition for rehearing, Shirley Lorraine Rankin, as the Executrix of John Gilbert Rankin, the deceased tortfeasor, challenges the existence of a cause of action in the plaintiff, Milton James Scott Thompson, No. 11997, enforceable in the District Court of the United States in and for the Southern District of California.

This plaintiff alleged in his complaint that he was personally injured, and set forth the nature of his personal injuries in Paragraph VIII of his amended complaint. [R. 11997, p. 6.] In Paragraph IX, of the said amended complaint, this plaintiff alleged that he had been gainfully employed in the operation of his automobile business, and that as a result of the said accident he was unable to attend to this business for a period of three months.

This Honorable Court held that this cause of action was maintainable against the defendant Shirley Lorraine Rankin, as executrix, on the strength of *Hunt v. Authier*, 28 Cal. 2d 288, 169 P. 2d 913, 171 A. L. R. 1379, and *Moffatt v. Smith*, 87 A. C. A. 877.

In *Hunt v. Authier*, *supra*, the Supreme Court of this State engrafted an exception to the rule laid down in *Clark v. Goodwin*, *supra*, and permitted recovery to the plaintiff for the material losses sustained by the widow and her minor children, including the value of future support. In *Moffatt v. Smith*, *supra*, the plaintiff was a chemical engineer and alleged that as a result of the personal injuries

sustained due to the negligence of the defendant he was prevented from carrying on his occupation and, therefore, suffered a property damage for which the Court permitted recovery.

The plaintiff Thompson, in his complaint, has not alleged a property damage within either the case of *Hunt v. Authier, supra*, or *Moffatt v. Smith, supra*. There is no allegation of loss of future support as defined in *Hunt v. Authier*, nor is there any allegation of the loss of future potential earnings within the rule laid down in the *Moffatt v. Smith* case. This being so, the action must stand as a mere suit for personal injuries which under *Clark v. Goodwin, supra*, would abate upon the death of the tortfeasor. Therefore, this action cannot be maintained in California. To permit such suit would be contrary to the express statutory provisions and general rule of law of this jurisdiction.

Loranger v. Nadeau, 215 Cal. 362 (1932);

McManus v. Red Salmon Canning Co., 37 Cal. App. 133 (1918).

This Honorable Court in its opinion further relied upon and cited the case of *Nash v. Wright*, 82 Cal. App. 2d 475 (1947), and stated that the "tortfeasor died." The tortfeasor in this case was Wright who apparently was still alive when the action was commenced. See *Nash v. Wright*, 82 Cal. App. 2d 467 (1947), 186 P. 2d 686, where the Court said: "Wright having evidently disappeared from the community was not available as a witness."

V.

CONCLUSION.

It is respectfully submitted that the petition for rehearing be granted.

O'CONNOR & O'CONNOR.

By WILLIAM V. O'CONNOR,

Attorneys for Appellees.

Certificate of Counsel.

I, William V. O'Connor, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

WILLIAM V. O'CONNOR,

Attorney for Petitioner.

No. 11998

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL J. FANNING, Individually, and as Post-
master of the City of Los Angeles, California,
Appellant,

vs.

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC., a corporation,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

OCT 16 1948

W. P. O'BRIEN,
CLERK

No. 11998

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL J. FANNING, Individually, and as Post-
master of the City of Los Angeles, California,

Appellant,

vs.

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC., a corporation,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

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NAMES AND ADDRESSES OF ATTORNEYS:

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Los Angeles 26, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 5043-P.H.

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC., a corporation,
Plaintiffs,

vs.

MICHAEL J. FANNING, Individually and as Post-
master of the City of Los Angeles, California,
Defendants.

ANSWER

For answer to the Amended Complaint of plaintiffs in the above-entitled action the defendant above named admits, denies and alleges as follows:

FIRST DEFENSE

That the complaint fails to state a cause of action against the defendant upon which relief can be granted.

SECOND DEFENSE

I.

Admits all of the allegations of paragraph I of plaintiffs' Amended Complaint.

II.

Answering the allegations of paragraph II of plaintiffs' Amended Complaint defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, basing his denial on that ground, denies generally and specifically the allegations of said paragraph. [2]

III.

Answering paragraph III of plaintiffs' Amended Complaint defendant admits all of the allegations therein contained.

IV.

Answering paragraph IV of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained.

V.

Answering paragraph V of plaintiffs' Amended Complaint defendant admits all of the allegations therein contained.

VI.

Answering paragraph VI of plaintiffs' Amended Complaint this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, basing his denial on that ground, denies generally and specifically the allegations of said paragraph.

VII.

Answering paragraph VII of plaintiffs' Amended Complaint this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, basing his denial on that ground, denies generally and specifically the allegations of said paragraph.

VIII.

Answering paragraph VIII of plaintiffs' Amended Complaint this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, basing his denial on that ground, denies generally and specifically the allegations of said paragraph.

IX.

Answering paragraph IX of plaintiffs' Amended Complaint admits all the allegations of said paragraph except this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff Al Williams is the sole owner and proprietor of said business which is located in said City of Los Angeles, California, and, basing his denial on that ground, denies generally and specifically said allegations of said paragraph. [3]

X.

Answering paragraph X of plaintiffs' Amended Complaint defendant admits all of the allegations therein contained, except defendant denies each and every pretense, representation and promise contained in the advertisements and in the written matter sent through the mails by the plaintiffs.

XI.

Answering paragraph XI of plaintiffs' Amended Complaint defendant admits all of the allegations therein contained.

XII.

Answering paragraph XII of plaintiffs' Amended Complaint defendant admits all of the allegations therein contained.

XIII.

Answering paragraph XIII of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained, but alleges that the said charges are supported by substantial evidence.

XIV.

Answering paragraph XIV of plaintiffs' Amended Complaint defendant admits that evidence produced at

said hearing with regard to the representations, pretenses and promises made by the plaintiffs came through the testimony of Inspector John W. Davis and others. Defendant denies generally and specifically all of the other allegations of said paragraph not specifically admitted.

XV.

Answering paragraph XV of plaintiffs' Amended Complaint defendant admits the charges of the respondents, but on the contrary alleges that each and every one of the charges preferred against the plaintiffs was supported by substantial evidence, and that the representations and promises in the advertising material of plaintiffs sent through the United States mails were in truth and fact misleading and did perpetrate and were perpetrating a fraud upon the addressees, to-wit: the public. Denies each and every other allegation not specifically admitted. [4]

XVI.

Answering paragraph XVI of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained.

XVII.

Answering paragraph XVII of plaintiffs' Amended Complaint defendant denies that all of the representations appearing on pages 16 to 39, both inclusive, of Exhibit A are true, and as to the other allegations contained in said paragraph this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, basing his denial on that ground, denies generally and specifically the allegations of said paragraph.

XVIII.

Answering paragraph XVIII of plaintiffs' Amended Complaint defendant admits the testimony and proceedings, as set forth in paragraph XVIII, but denies each and every allegation not herein specifically admitted.

XIX.

Answering paragraph XIX of plaintiffs' Amended Complaint defendant admits all of the allegations therein contained.

XX.

Answering paragraph XX of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained.

XXI.

Answering paragraph XXI of plaintiffs' Amended Complaint defendant admits all of the allegations therein contained.

XXII.

Answering paragraph XXII of plaintiffs' Amended Complaint defendant denies each and every allegation contained therein and alleges that there was substantial evidence produced at the hearing to support the findings of the Postmaster General in that the plaintiffs are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of Sections 259 and 732 of Title 39, United States Code, and which scheme and device were deceiving, misleading and committing a fraud upon the addressees of said mail. to-wit: the public. [5]

XXIII.

Answering paragraph XXIII of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained.

XXIV.

Answering paragraph XXIV of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained and alleges that the said record, Exhibit A, and the said Findings of Fact, Exhibit B, did establish to the satisfaction of the Postmaster General that the plaintiffs were and are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of Sections 259 and 732 of Title 39, United States Code, and which scheme and device were deceiving, misleading and committing a fraud upon the addressees of said mail, to-wit: the public.

XXV.

Answering paragraph XXV of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained, but admits that the affidavits set forth in said paragraph were presented, but as to the statements and representations contained in said affidavits the defendant is without knowledge or information sufficient to form a belief as to the truth of the statements and representations contained in said affidavits, and, basing his denial on that ground, denies generally and specifically the contents of the said affidavits.

XXVI.

Answering paragraph XXVI of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained.

XXVII.

Answering paragraph XXVII of plaintiffs' Amended Complaint defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, basing his denial upon that ground, denies generally and specifically the allegations of said paragraph.

XXVIII.

Answering paragraph XXVIII of plaintiffs' Amended Complaint defendant denies each and every allegation therein contained. [6]

XXIX.

Answering paragraph XXIX of plaintiffs' Amended Complaint defendant admits that on or about August 17, 1945 the plaintiff Al Williams voluntarily consented that his mail should be withheld from delivery at Los Angeles, California, pending the decision of the Post Office Department upon the issues presented at said hearing; that as to the allegations therein contained that plaintiff Al Williams owns his own home and place of residence and other real property in Los Angeles and desires and expects to reside there during the remainder of his lifetime, this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations, and, basing his denial on that ground, denies generally and specifically the said allegations. Defendant denies generally and specifically all of the other allegations of said paragraph XXIX.

XXX.

Answering paragraph XXX of plaintiffs' Amended Complaint defendant admits all of the allegations therein, except the defendant denies generally and specifically that there were being received daily at said Post Office approximately fifty letters addressed to the plaintiff Al Williams and about four hundred fifty letters daily addressed to said plaintiff under the other designations set forth in said fraud order, or in any other amount either, as alleged in said paragraph, or otherwise, or at all.

XXXI.

Answering paragraph XXXI of plaintiffs' Amended Complaint the defendant denies each and every allegation therein contained.

THIRD DEFENSE

I.

For a further separate and distinct defense defendant alleges that pursuant to statute, Title 39, U. S. C. A., Section 259, the Postmaster General may, upon evidence satisfactory to him that any person or company is conducting any scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct any postmaster, at which office registered letters or any other letters or mail matter arrive directed to any such person or company, to return all such mail [7] matter to the postmaster at the office at which it was originally mailed, and also such mail matter so returned to such

postmaster shall be by him returned to the writers thereof under such regulations as the postmaster may prescribe.

II.

That the Postmaster General, after a hearing, found upon evidence satisfactory to him that the mailing material sent through the United States mails by the plaintiffs was a scheme for the obtaining of money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of Sections 259 and 732 of Title 39, United States Code, and which scheme and device were deceiving, misleading and committing a fraud upon the addressees of said mail, to-wit: the public.

III.

That thereafter, on December 10, 1945, the Postmaster General made an order in words and figures as follows:

“Post Office Department
Washington

“Order No. 29990

Dec 10 1945

“It having been made to appear to the Postmaster General upon evidence satisfactory to him, that Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System, and their officers and agents as such, at Los Angeles, California, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the

memorandum of the Solicitor for the Post Office Department of the date of December 6, 1945, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said party & concerns and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof [8] will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

“And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said party & concerns to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words ‘Fraudulent: Mail to this address returned by order of Postmaster General’ plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words ‘Fraudulent: Mail to this address returned by order of Postmaster General’ plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) J. M. Donaldson
Acting Postmaster General

(Case No., 44237-F)

To the Postmaster.

Los Angeles, California.”

Wherefore this defendant prays:

1. That plaintiffs take nothing by its complaint against this defendant and that the same be dismissed.

2. For the costs of suit incurred and for such other and further relief as to the court may seem just and proper in the premises.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Assistant United States Attorney
Chief, Civil Division

BERNARD B. LAVEN

Assistant United States Attorney
Attorneys for Defendant Michael J. Fanning [9]

Received copy of the within Answer this 29th day of March, 1948. Richard North, Attorney for Plaintiffs.

[Endorsed]: Filed Mar. 29, 1948. Edmund L. Smith, Clerk. [10]

[Title of District Court and Cause]

MOTION FOR SUMMARY JUDGMENT

Come now the above-named plaintiffs and move the court to grant and enter a summary judgment herein in their favor and against the defendants, making permanent the preliminary injunction heretofore issued herein, upon the ground that the answer of the defendants filed herein raises no genuine issue as to any material fact alleged in plaintiffs' amended complaint, all material allegations thereof being admitted by said answer, leaving only a question of law to be decided, and upon the ground that the fraud

order was issued by the Postmaster General upon opinion evidence alone, without authority to do so, and that there was and is no substantial evidence to support the Findings of Fact of the Postoffice Department (Exhibit "B" in amended complaint) or the issuance of said fraud order.

Dated March 31, 1948.

RICHARD L. NORTH

Attorney for Plaintiffs [11]

Received copy of the within Motion for Summary Judgment this 31st day of March, 1948. James M. Carter, by Veloris Bonhus, Attorney for Deft.

[Endorsed]: Filed Mar. 31, 1948. Edmund L. Smith, Clerk. [12]

[Title of District Court and Cause]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Defendants Above-Named and to James M. Carter,
U. S. Attorney at Los Angeles; Clyde C. Downing
and Bernard B. Laven, Assistant U. S. Attorneys,
Their Attorneys Herein:

You and each of you will please take notice that plaintiffs will, on Monday, April 12, 1948, at 10:00 o'clock A. M. of said day, or as soon thereafter as the matter may be heard by the court in the courtroom of the Honorable Peirson M. Hall, Judge of said court, located on the second floor of the Federal Building at Temple and Spring Streets, in the City of Los Angeles, State of California, move the said court for a summary judgment herein in favor of plaintiffs and against the defendants, upon the

ground that the answer of the defendants filed herein raises no material issue of fact but leaves only a question of law to be decided, and upon the further ground that the fraud order issued by the [13] Postmaster General and directed against the plaintiffs was issued upon opinion evidence and without authority, and without any substantial evidence to support it.

Said motion will be made and based upon the amended complaint and the answer thereto, and upon the records and files herein.

Dated March 31, 1948.

RICHARD L. NORTH

Attorney for Plaintiffs [14]

Received copy of the within Notice of Motion for Summary Judgment this 31st day of March, 1948. James M. Carter, by Veloris Bonhus, Attorney for Defendants.

[Endorsed]: Filed Mar. 31, 1948. Edmund L. Smith, Clerk. [15]

[Title of District Court and Cause]

AMENDED ANSWER

Defendant Michael J. Fanning, individually and as postmaster of the United States Post Office at Los Angeles, California, for answer to the plaintiffs' amended complaint herein, admits, denies and alleges:

FIRST DEFENSE

I.

Defendant admits the jurisdiction of this Honorable Court in the above-entitled cause as alleged in paragraph I of the amended complaint herein.

II.

Answering paragraph II of plaintiffs' amended complaint defendant denies each and every allegation therein contained.

III.

Answering paragraph III of plaintiffs' amended complaint defendant denies each and every allegation therein contained. [16]

IV.

Answering paragraph IV of plaintiffs' amended complaint this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, and, basing his denial on that ground, denies generally and specifically all the allegations of said paragraph and avers the facts to be that the fraud order against plaintiffs was issued upon evidence which was satisfactory to the Postmaster General and which was adduced during the hearing before the Post Office Department which was held June 20, 1945, after due notice to plaintiff as more fully set forth in the memorandum for the Postmaster General embodying a finding of fact and recommending the issuance of a fraud order dated December 6, 1945, and signed by the Solicitor of the Post Office Department, a copy of which is attached to plaintiffs' complaint as Exhibit A, which sets forth the particulars of the aforesaid hearing and finds the facts which were made matters of record during said proceeding. Answering further upon information and belief defendant avers that all of the evidence made a matter of record at such hearing was transmitted to the Postmaster General for his consideration, together with a brief and supplemental brief filed by counsel for Al Williams, et al.,

subsequent to the hearing and after being furnished with a copy of the transcript of testimony received thereat. Upon consideration of the evidence before him as aforesaid, the Postmaster General issued a fraud order against Al Williams, Al Williams Health Conditioner, and other names which were then being employed by plaintiff for the purpose of conducting a fraudulent enterprise through the United States mails contrary to the provisions of the postal fraud order statutes, Title 39 U. S. Code, Sections 259 and 732, as more fully set forth in Exhibit A attached to plaintiffs' complaint.

V.

Defendant admits that he is now and has been for sometime past postmaster in charge of the United States Post Office at the City of Los Angeles, California; that he is a resident and citizen of said State but denies that he has exclusive management of said office inasmuch as he is subject to the provisions of the Postal Laws and Regulations and to the instructions given him pursuant [17] thereto by the Postmaster General of the United States with respect to the receipt and distribution of all mail matter received at said post office through the United States mails.

VI.

Defendant denies the allegations of paragraph VI of the amended complaint of plaintiff except insofar as they are conclusions of law which, defendant is advised by counsel, require no answer. Further answering said paragraph defendant, upon information and belief, avers that the hearing in this case was conducted by the Post Office Department at Washington, D. C., in accordance with the practice of the Department in such cases which has existed over a period of many years and which, upon

being questioned, has not been found by the Supreme Court of the United States or any other court, to be illegal or improper practice or method of hearing such cases. Further answering said paragraph defendant, upon information and belief, avers that the Congress of the United States does not authorize the Postmaster General to hold hearings with respect to the alleged violation of the postal fraud statutes any other place except Washington, D. C., nor has it provided him with appropriations which may be expended for the purpose of holding hearings in any other place outside of the Department.

VII.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of plaintiffs' amended complaint and refers this Honorable Court to the finding of fact of the Solicitor of the Post Office Department attached to plaintiffs' complaint as Exhibit A for a description of the operation and effectiveness of the Al Williams Plan of Health Reducing, false and fraudulent sale of which through the mails constitutes the basis for the fraud order against plaintiff.

VIII.

Defendant denies that plaintiffs' business is not an unlawful one as alleged in paragraph VIII of plaintiffs' amended complaint and again respectfully refers this Honorable Court to Exhibit A attached to plaintiffs' complaint, namely, the finding of fact of the Solicitor of the Post Office Department which sets forth the true facts with respect to the fraudulent scheme which plaintiffs were [18] conducting through the mails and also the order of the Postmaster General dated December 6, 1945, stating that evidence is satisfactory to him that said scheme is fraudu-

lent and constitutes a violation of 39 U. S. Code, Sections 259 and 732.

IX.

Answering paragraph IX of plaintiffs' amended complaint this defendant has no knowledge or information sufficient to form a belief as to whether plaintiff Al Williams is the sole owner of said business and, basing his denial on that ground, denies generally and specifically said allegation; and further answering said paragraph IX defendant has no knowledge or information sufficient to form a belief as to whether any of the letters addressed to Al Williams relate to social or other subjects not connected with the unlawful and fraudulent scheme aforesaid, but alleges that such allegation is not material to the issues before this Honorable Court, and upon information and belief admits that Al Williams, using his own and the several names set forth in the fraud order complained of by plaintiffs, obtained and attempted to obtain remittances of money through the mails from divers persons throughout the United States by means of pretenses, representations and promises, more fully described in the findings of fact of the Solicitor of the Post Office Department, attached to plaintiffs' complaint as Exhibit A, and that plaintiffs' said representations were determined by the Postmaster General to be false and fraudulent, as set forth in said Exhibit A.

X.

Answering paragraph X of plaintiffs' amended complaint defendant admits the allegation therein contained with respect to the notice served upon plaintiffs to show cause why a fraud order should not be issued against Al Williams, et al., but defendant denies each and every other allegation therein specifically not admitted.

XI.

Answering paragraph XI of plaintiffs' amended complaint defendant admits the allegations in said paragraph XI with respect to the notice served upon plaintiffs to show cause why a fraud order should not be issued against Al Williams, et al. [19]

XII.

Answering paragraph XII of plaintiffs' amended complaint defendant admits all of the allegations therein contained.

XIII.

Answering paragraph XIII of plaintiffs' amended complaint defendant denies each and every allegation therein contained, but alleges that there was ample and substantial evidence to support and prove the charges of fraudulent use of the mails by plaintiffs, as more fully set forth in Exhibit A attached to plaintiffs' complaint, which is the order of the Postmaster General and the findings of fact of the Solicitor of the Post Office Department, which set forth the facts which prove that plaintiffs' advertisements falsely represented to the public that any obese person, no matter how much overweight or how old, could easily and safely reduce weight as desired easily and safely without strict dieting, and that the Williams plan tablets would prevent persons who were reducing from becoming hungry, but would in a few days' time result in the user's loss of a desire to overeat and cause the user to feel full of pep and have more energy; and further, as shown by said Exhibit A, plaintiffs were falsely representing that their so-called "Special Body Massage Cream" would eliminate flabby flesh caused by loss of weight and would beautify the contour of the

throat, bust, upper arms, calves of legs and thighs, all of which representations were found to be false and fraudulent upon the basis of uncontradicted medical expert testimony adduced at the hearing held with respect to this matter on June 30, 1945, which testimony on behalf of the Government was not rebutted by any competent evidence offered by Al Williams in reply thereto, as more fully set forth in the finding of fact of the Solicitor of the Post Office Department, Exhibit A attached to plaintiffs' complaint.

XIV.

Answering paragraph XIV of plaintiffs' amended complaint defendant denies generally and specifically all of the allegations therein contained except that in addition to the testimony of Post Office Inspector John W. Davis there was presented at said hearing the testimony of the only qualified medical expert witness there present who was competent to testify at such hearing, there being [20] no medical witness of any kind offered by the plaintiffs, as shown by Exhibit A attached to plaintiffs' amended complaint, and that the testimony of said medical expert witness for the Government clearly and conclusively proved the false and fraudulent character of the representations made by the plaintiff Al Williams for the purpose of selling the so-called Williams plan to the public through the mails.

XV.

Answering paragraph XV of plaintiffs' amended complaint defendant denies each and every allegation therein contained, but on the contrary alleges that each and every one of the charges preferred against the plaintiffs was supported by substantial evidence, and that the representa-

tions and promises in the advertising material of the plaintiffs sent through the mails were in truth and fact misleading and did perpetrate and were perpetrating a fraud upon the addressees, to-wit: the public.

XVI.

Answering paragraph XVI of plaintiffs' amended complaint defendant denies each and every allegation therein contained and incorporates by reference the findings of fact of the Solicitor of the Post Office Department which is marked Exhibit A and attached to plaintiffs' complaint.

XVII.

Answering paragraph XVII of plaintiffs' amended complaint defendant denies that all of the representations appearing on pages 16 to 39, both inclusive, of Exhibit A are true, but admits that said representations have been made to the public over a period of time; and for further answer to said paragraph XVII defendant incorporates by reference Exhibit A, attached to plaintiffs' complaint, which is the finding of fact of the Solicitor of the Post Office Department.

XVIII.

Answering paragraph XVIII of plaintiffs' amended complaint defendant admits the testimony and proceedings as set forth in paragraph XVIII, and particularly admits that the Government produced as an expert witness Dr. Lawrence E. Putnam who is fully qualified by training and experience to testify regarding the matters before the Department in the hearing with respect to [21] plaintiffs' so-called reducing plan and whose qualifications to testify were accepted by plaintiffs' counsel at said hearing as shown by his statements set forth in a copy of the

transcript of the proceedings which is Exhibit A to the complaint, page 63, line 22:

“Mr. Lawson. Well, I think the witness is a qualified witness but I think the weight of his testimony is to be determined by the extent of his practice with regard to any particular case.

“Assistant Solicitor. That’s a question of weight.

“Mr. Lawson. That’s a question of weight. I think the witness is qualified.”

Further answering said paragraph XVIII of plaintiffs’ amended complaint defendant alleges that the excerpts from Dr. Putnam’s testimony set forth in said paragraph are incomplete and not representative of the evidence which he furnished in the course of the hearing and which is accurately summed up as to fact and effect in the findings of fact of the Solicitor which is attached as Exhibit A to plaintiffs’ complaint and to which the Court is respectfully referred by the defendant for further answer to the aforesaid allegations of said paragraph XVIII.

Further answering said paragraph XVIII defendant denies that Dr. Putnam’s testimony was exclusively in the nature of opinion evidence but alleges that as the transcript attached to the complaint as Exhibit A clearly shows, Dr. Putnam testified concerning numerous scientific facts, well established and well known which show the lack of any truthful basis for the representations made by plaintiff in his advertising literature and particularly with respect to the advertising representations which are specifically charged to be false and are more fully set forth in the finding of fact of the Solicitor in said Exhibit A, which shows that the said representations are in fact false and fraudulent.

Further answering said paragraph XVIII of the complaint defendant alleges that the transcript of the proceedings and the finding of fact of the Solicitor show that Al Williams was not competent to testify concerning the scientific medical aspects of the so-called reducing plan, and upon information and belief alleges that there are numerous physicians in Washington, D. C., upon whom plaintiffs could have called for expert medical testimony with respect to Williams' [22] so-called reducing plan if they honestly and truly desired to inform the Post Office Department as to the scientific basis of the "plan," if any exists; and that the Solicitor of the Post Office Department found from competent and relevant evidence before him that there is no scientific factual basis for either the testimony which Williams attempted incompetently to present or for the representations by means of which the public was misled and induced to send remittances of money through the mails to plaintiffs in the operation of their scheme through the mails.

XIX.

Answering paragraph XIX of plaintiffs' amended complaint defendant admits that on December 10, 1945 the Postmaster General issued a fraud order set forth in paragraph XIX of plaintiffs' amended complaint and that a copy of the same was received by the defendant in December, 1945, and further admits that a copy thereof was received by the plaintiffs on or about December 17, 1945.

XX.

Answering paragraph XX of plaintiffs' amended complaint defendant denies each and every allegation therein contained.

XXI.

Answering paragraph XXI of plaintiffs' amended complaint the defendant admits that Exhibit A referred to therein is a transcript of the testimony adduced at the hearing held on June 20, 1945; that Exhibit B referred to therein is a copy of the findings of fact of the Solicitor of the Post Office Department made subsequent thereto, but denies that the same constitutes the whole record in this proceeding or that the exhibits not included therein are unimportant as alleged in the said paragraph.

XXII.

Answering paragraph XXII of plaintiffs' amended complaint defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph and, basing his denial on that ground, denies generally and specifically each and every allegation of said paragraph, but alleges that the transcript of the testimony and the entire record contain ample evidence to support the findings of fact of the Solicitor of the Post Office [23] Department, showing that the plaintiffs were engaged in obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of 39 U. S. Code 259 and 732, and that the fraud order, which was issued by the Postmaster General to protect the public from the scheme which was then and there being conducted by the plaintiffs through the means of the mails, was legal and necessary to protect the public from being further deceived, misled and swindled by the plaintiffs.

XXIII.

Answering paragraph XXIII of plaintiffs' amended complaint defendant denies each and every allegation therein contained, but alleges that the record shows that the

findings of fact of the Solicitor of the Post Office Department fully demonstrate that there was ample evidence to support the issuance of the fraud order by the Postmaster General against the fraudulent scheme which the plaintiffs were conducting through the mails prior to the issuance of said fraud order.

XXIV.

Answering paragraph XXIV of plaintiffs' amended complaint defendant denies each and every allegation therein contained, and alleges that the said record, Exhibit A, and the said findings of fact, Exhibit B, did establish to the satisfaction of the Postmaster General that the plaintiffs were and are engaged in conducting a scheme and device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, all in violation of Title 39, Sections 259 and 732, U. S. Code, which scheme and device were deceiving, misleading and perpetrating a fraud upon the addressees of the mail, to-wit: the public.

XXV.

Answering paragraph XXV of plaintiffs' amended complaint defendant denies each and every allegation therein contained, and particularly that Al Williams or any other respondent party to said proceedings was deprived of a full and fair hearing, or that his or their rights were violated in any way, and further answering alleges that the plaintiffs are in effect endeavoring to blame the Post Office Department for their failure to present competent testimony and [24] evidence at the hearing held in the Post Office Department on June 20, 1945, although respondents were duly apprised long before said hearing of the charges of fraud from which it was obvious to them that scientific proof presented through qualified competent

medical witnesses would be necessary on the part of both the Government and the respondents, and that plaintiffs' failure to present proof by means of competent witnesses at said hearing, their mistaken attempt to present Al Williams as a competent, qualified witness on medical matters is not attributable to any failure on the part of the Post Office Department to afford plaintiffs full opportunity to be heard. Further answering said paragraph XXV of plaintiffs' amended complaint, defendant, upon information and belief and upon the basis of transcript of the proceedings of this case before the Post Office Department, alleges that the answer filed to the charges of fraudulent use of the mails by Al Williams, et al., which was received by the Solicitor of the Post Office Department at the commencement of the hearing, does not allege any hardship on the part of the plaintiffs here (respondents in said hearing) on the basis of the unavailability of medical witnesses to testify on behalf of Al Williams and, upon information and belief, alleges that such issue was only raised long after the hearing when respondent had returned to California and realized that the testimony before the Post Office Department given by Dr. Lawrence E. Putnam conclusively showed the false and fraudulent character of the representations made by Al Williams, whereupon plaintiffs sought to create a further issue and to complicate and delay the decision in this case to the advantage of plaintiffs and the irreparable injury to the public by requesting the reopening of the already closed record for the alleged purpose of hearing doctors whose affidavits purport to be set forth by plaintiffs in paragraph XXV of the plaintiffs' amended complaint and who refused to appear before the Solicitor of the Post Office Department at Washington, D. C., to testify, which affi-

davits are wholly immaterial to the issue before this Court as to whether there was substantial evidence before the Postmaster General, and upon which, same being satisfactory to him, he did legally issue the fraud order against plaintiffs pursuant to the provisions of Title 39, U. S. Code, 259 and 732. [25]

XXVI.

Answering paragraph XXVI of plaintiffs' amended complaint defendant denies each and every allegation therein contained.

XXVII.

Answering paragraph XXVII of plaintiffs' amended complaint the defendant denies each and every allegation therein contained.

XXVIII.

Answering paragraph XXVIII of plaintiffs' amended complaint defendant denies each and every allegation therein contained, and alleges upon information and belief that the evidence before the Postmaster General completely contradicts and discredits the allegations of said paragraph XXVIII and shows that the evidence upon which the fraud order in this case was issued by the Postmaster General for the protection of the public is based upon uncontradicted, ample and substantial evidence showing that Al Williams, et al., were conducting a fraudulent scheme through the United States mails in violation of Sections 259 and 732, Title 39, United States Code.

XXIX.

Answering paragraph XXIX of plaintiffs' amended complaint defendant admits the impounding of mail addressed to Al Williams and other names used by plaintiffs

in conducting said scheme through the mails and fully set forth in the order of the Postmaster General. Defendant further admits that a substantial amount of mail has been received at the Los Angeles Post Office addressed to Al Williams and other names used by him in the operation of the fraudulent mail order scheme against which the Postmaster General's order is directed; that defendant has no knowledge or information sufficient to form a belief as to whether said mail received at the said post office contains remittances of money orders and, basing his denial on that ground, denies generally and specifically said allegations. Defendant further alleges upon information and belief that all of such mail and remittances received at said post office addressed to Al Williams under the various names used by him were obtained by means of false and fraudulent pretenses, representations and promises made in violation of Title 39, U. S. Code, Sections 259 and 732, as more fully set forth in Exhibit A hereof and as determined by the [26] Postmaster General prior to the issuance of the fraud order complained of herein. Further answering said paragraph defendant has no knowledge or information sufficient to form a belief as to whether certain mail so addressed will be received at the Los Angeles Post Office as long as the plaintiffs' names shall be listed in any directory in said city; and as to whether plaintiff Al Williams owns his own home and place of residence and other real property in Los Angeles and desires and expects to reside there during the remainder of his lifetime and, basing his denial on that ground, denies generally and specifically the said allegations. Defendant denies generally and specifically all of the other allegations of said paragraph XXIX not specifically admitted.

XXX.

Answering paragraph XXX of plaintiffs' amended complaint defendant admits that the fraud order against Al Williams and other names set forth therein will be fully enforced, having been properly and legally issued by the Postmaster General, and admits also that pursuant to the provisions of said order all mail addressed to Al Williams, Al Williams, Health Conditioner, Al Williams, Physical Conditioner, Al Williams Health System, The Al Williams Health System, and Williams Health System, will be returned to the senders stamped, "Fraudulent: Mail to this address returned by order of the Postmaster General," as alleged in paragraph XXX of the complaint and that unless permanently enjoined therefrom defendant will so dispose of all matter received at the post office at Los Angeles, California, addressed to the names set forth in the fraud order complained of herein; defendant denies that mail addressed to any other than the names set forth in the order of the Postmaster General will be so treated and avers that he has and will deliver all other mail addressed to any name not so specifically set forth in the fraud order in accordance with the directions on the envelopes or wrappers containing said mail unless otherwise directed by the addressee of such mail or by the Postmaster General or by the order of the court.

XXXI.

Answering paragraph XXXI of plaintiffs' amended complaint defendant denies that plaintiffs will suffer any irreparable loss or injury as alleged by said paragraph if the fraud order which was issued by the Postmaster General for the [27] protection of the public against the fraudulent enterprise being carried on through the mails by plaintiffs is not enjoined by this Court.

XXXII.

Defendant denies each and every allegation not herein specifically admitted except as to those matters as to which he has alleged that he is without knowledge or information and those matters which he has answered upon information and belief.

SECOND DEFENSE

Plaintiff has no claim upon which relief can be granted as shown by the provisions of the Postal Laws and Regulations and the transcript of the proceedings before the Post Office Department, the findings of fact of the Solicitor of the Post Office Department, and the provisions of the order of the Postmaster General.

THIRD DEFENSE

I.

For a further separate and distinct defense defendant alleges that pursuant to statute, Title 39, U. S. C. A., Section 259, the Postmaster General may, upon evidence satisfactory to him that any person or company is conducting any scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct any postmaster, at which office registered letters or any other letters or mail matter arrive directed to any such person or company, to return all such mail matter to the postmaster at the office at which it was originally mailed, and also such mail matter so returned to such postmaster shall be by him returned to the writers thereof under such regulations as the postmaster may prescribe.

II.

That the Postmaster General, after a hearing, found upon evidence satisfactory to him that the mailing material sent through the United States mails by the plaintiffs was a scheme for the obtaining of money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of Sections 259 and 732 of Title 39, United States Code, and which scheme and device were deceiving, misleading and committing a fraud upon the addressees of said mail, to-wit: the public. [28]

III.

That thereafter, on December 10, 1945, the Postmaster General made an order in words and figures as follows:

“Post Office Department
Washington

“Order No. 29990

Dec 10 1945

“It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System, and their officers and agents as such, at Los Angeles, California, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the memorandum of the Solicitor for the Post Office Department of the date of December 6, 1945, and by

authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said party & concerns and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

“And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said party & concerns to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words ‘Fraudulent: Mail to this address returned by order of Postmaster General’ plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other [29] matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words ‘Fraudulent: Mail to this address returned by order of Postmaster General’ plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) J. M. Donaldson

Acting Postmaster General

(Case No. 44237-F)

To the Postmaster.

Los Angeles, California.”

Wherefore this defendant prays:

1. That plaintiffs take nothing by their complaint against this defendant and that the same be dismissed.

2. For the costs of suit incurred and for such other and further relief as to the Court may seem just and proper in the premises.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Assistant United States Attorney

Chief, Civil Division

BERNARD B. LAVEN

Assistant United States Attorney

Attorneys for Defendant Michael J. Fanning [30]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 9, 1948. Edmund L. Smith,
Clerk. [31]

[Title of District Court and Cause]

MOTION TO STRIKE AMENDED ANSWER

Come now the plaintiffs above-named and move the Court to strike from the files of this action the amended answer of the defendants, upon the ground that said amended answer was filed herein after plaintiffs' motion for summary judgment upon the original answer was placed upon the calendar for hearing, and that said

amended answer was so filed without leave of Court and without the consent of plaintiffs.

Dated April 13, 1948.

RICHARD L. NORTH

Attorney for Plaintiff [32]

Received copy of the within Motion to Strike Amended Answer this 13th day of April, 1948. James M. Carter, U. S. Atty., Attorney for Defendants, by Gertrude M. Johnson.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [33]

[Title of District Court and Cause]

NOTICE OF MOTION TO STRIKE AMENDED
ANSWER

To the Defendants Above-Named, and to James M. Carter, U. S. Attorney at Los Angeles; Clyde C. Downing and Bernard B. Laven, Assistant U. S. Attorneys, Their Attorneys Herein:

You and each of you are hereby notified that plaintiffs will, on Monday, April 19, 1948, at 10:00 o'clock A. M., or as soon thereafter as the matter may be heard by the Court, in the courtroom of the Honorable Peirson M. Hall, Judge of said Court, located on the second floor of the Federal Building at Temple and Spring Streets, in the City of Los Angeles, State of California, move the said Court to strike from the files of this action the amended answer of the defendants, upon the ground that said amended answer was filed herein after plaintiffs' motion for summary judgment upon the original answer was placed upon the calendar for hearing, and that said

amended answer was so filed [34] without leave of Court and without plaintiffs' consent.

Said motion will be made and based upon the records and files herein, and upon the rules of said Court.

Dated April 13, 1948.

RICHARD L. NORTH
Attorney for Plaintiffs

Good cause appearing therefor, it is hereby

Ordered that the time of notice of hearing of the above motion to strike the amended answer shall be and it is hereby shortened to ~~four days~~ service of the within notice on or before the close of business on Apr. 14, 1948.

Dated April 13, 1948.

PEIRSON M. HALL
Judge of the District Court [35]

POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION TO STRIKE THE
AMENDED ANSWER

Plaintiffs' motion for summary judgment, based upon the original answer, was placed upon the court calendar several days before the amended answer was filed, without leave of Court or consent of the adverse party.

Rule 15(a) Federal Rules of Civil Procedure. [36]

Received copy of the within Notice of Motion to Strike Amended Answer and Points and Authorities this 13th day of April, 1948. James M. Carter, U. S. Atty., by Gertrude M. Johnson, Attorney for Defendants.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [37]

[Minutes: Monday, April 19, 1948]

Present: The Honorable Peirson M. Hall, District Judge.

For (1) hearing on motion of plaintiff for a summary judgment, pursuant to notice thereof filed March 31, 1948, and (2) motion of plaintiff to strike amended answer, pursuant to notice thereof filed April 13, 1948; R. L. North, Esq., appearing as counsel for plaintiff; B. B. Laven, Ass't U. S. Att'y, appearing as counsel for defendant;

Attorney North argues in support of motion to strike amended answer. Attorney Laven makes a statement.

The Court orders motion of plaintiff to strike the amended answer granted.

Attorney North argues in support of motion for a Summary Judgment. Attorney Laven argues in opposition.

Court orders cause submitted and temporary restraining order remain in effect. [38]

[Title of District Court and Cause]

MEMORANDUM

Repeated examinations of the entire record of the proceedings before the Postmaster General confirms the contention of the plaintiff that the only evidence in such record to support the order is the opinion evidence of one Putnam, who identified himself as a doctor employed full time by the Food and Drug Administration, and who practiced medicine at night and odd times.

Under the rule of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 and the numerous cases following it, among which are *Jarvis v. Shackelton*, 136 Fed. 2nd, 116, *Pinkus v. Walker*, 21 Fed. Supp. 610, and *Pinkus v. Walker*, 71 Fed. Supp. 993, mere opinion evidence is not substantial evidence to support such an order.

The order of the Postmaster General is not supported by any substantial evidence and it was therefore beyond his lawful authority to issue and is void.

Judgment will be for the plaintiff, who will prepare the appropriate findings, judgment and permanent injunction. The injunction now in force will remain in effect until the permanent injunction is issued.

Dated April 27th, 1948.

PEIRSON M. HALL

Judge

[Endorsed]: Filed Apr. 28, 1948. Edmund L. Smith, Clerk. [39]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW FOLLOWING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

The above-entitled cause came on regularly for hearing on the 19th day of April, 1948, on plaintiffs' motion for summary judgment, Richard L. North, Esq. appearing as counsel for plaintiffs, and Bernard B. Laven, Esq., Assistant United States Attorney at Los Angeles, appearing as counsel for the defendants, and the court having considered the pleadings and the exhibits attached to the amended complaint, and having heard oral argument from

counsel on both sides and considered also the written briefs filed by the parties on both sides; having found that there is no genuine issue raised by the answer as to any material fact, and being fully advised in the premises, now finds the following:

FINDINGS OF FACT

1) That the Postmaster General issued that certain fraud [40] order No. 29990, dated December 10, 1945, and set forth in paragraph XIX of plaintiffs' Amended Complaint, and that the defendant, as Postmaster at Los Angeles, California, has ever since enforced the said order against plaintiffs until restrained by preliminary injunction issued herein February 16, 1948.

2) That the said fraud order was issued and based upon evidence taken at a hearing before the Postoffice Department, and that a true copy of all of the said evidence and of all of the proceedings at said hearing is marked "Exhibit A" and attached to the Amended Complaint by reference.

3) That a true copy of the findings of the Postoffice Department after the said hearing, is attached to the Amended Complaint by reference and marked "Exhibit B."

4) That fraud order No. 29990 referred to in the pleadings and issued by the Postmaster General on December 10, 1945, was so issued and based upon opinion evidence.

CONCLUSIONS OF LAW

Whereupon the court concludes as a matter of law:

I.

That the Postmaster General had no authority to issue the said fraud order and that it is void and of no effect, and that plaintiffs are entitled to judgment.

II.

That said fraud order was issued by the Postmaster General without substantial evidence to support it.

III.

That a permanent injunction should be issued, permanently restraining and enjoining the defendants from enforcing the said fraud order or any of the provisions or requirements thereof.

Dated: ~~April 30~~, May 6 [PH] 1948.

PEIRSON M. HALL

Judge of the District Court [41]

Received copy of the within Findings of Fact and Conclusions of Law Following Plaintiffs' Motion for Summary Judgment this 4th day of May, 1948. James M. Carter, U. S. Atty., by Gertrude M. Johnson, Attorney for Defendants.

[Endorsed]: Filed May 6, 1948. Edmund L. Smith, Clerk. [42]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 5043 P.H. Civil

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC., a corporation,
Plaintiffs,

vs.

MICHAEL J. FANNING, Individually and as Post-
master of the City of Los Angeles, California,
Defendants.

ORDER FOR SUMMARY JUDGMENT

This cause came on to be heard on the 19th day of April, 1948, on motion of plaintiffs for summary judgment, and the court having considered the pleadings in the action and particularly the exhibits attached to the amended complaint by reference, and having heard oral argument from counsel on both sides, and also considered the written argument of both counsel for plaintiff and defendant; having found that there is no genuine issue as to any material fact, and having concluded that the fraud order referred to in the amended complaint was issued by the Postmaster General without authority to do so and without substantial evidence to support it, and having concluded that plaintiffs are entitled to judgment as a matter of law;

It Is Hereby Ordered, Adjudged and Decreed:

1) That summary judgment be entered in favor of plaintiffs. [43]

2) That the preliminary injunction heretofore granted against the defendant be and it is hereby made permanent.

Dated ~~April~~ May 6, 1948.

PEIRSON M. HALL

Judge of the District Court

Judgment entered May 6, 1948. Docketed May 6, 1948. C. O. Book 50, page 528. Edmund L. Smith, Clerk; by J. M. Horn, Deputy. [44]

Received copy of the within Order for Summary Judgment this 3rd day of May, 1948. James M. Carter, U. S. Atty., Attorney for Defendants, by Gertrude M. Johnson.

[Endorsed]: Filed May 6, 1948. Edmund L. Smith, Clerk. [45]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 5043 PH-Civil

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC., a corporation,
Plaintiffs,

vs.

MICHAEL J. FANNING, Individually and as Post-
master of the City of Los Angeles, California,
Defendants.

PERMANENT INJUNCTION

The above-entitled cause came on to be heard on the 19th day of April, 1948, before the Honorable Peirson M. Hall, Judge of the above-entitled court, on plaintiffs'

motion for summary judgment, duly and regularly served and filed herein, Richard L. North, Esq. appearing as counsel for plaintiffs, and Bernard B. Laven, Esq., Assistant United States Attorney at Los Angeles, appearing as counsel for defendants; and the Court having considered the pleadings and the briefs of respective counsel on the motion, and upon due consideration thereof it appearing to the Court that the plaintiffs should be granted the relief prayed for in their Amended Complaint, and that a permanent injunction should be issued against defendants, and the Court being fully advised in the premises;

Now, Therefore, It Is Ordered that the defendants, [46] Michael J. Fanning, individually, and Michael J. Fanning, as Postmaster of the City of Los Angeles, State of California, and each of them, their agents, deputies, servants and employees, and all persons acting by, through or under them or either of them or by or through their order, be, and they are hereby permanently restrained from in any manner failing or refusing to deliver in the regular course of the mail any and all mail addressed to Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System; Williams Health System, or Al Williams Health System of Los Angeles, Inc., and from in any manner carrying out in any respect that certain Order No. 29990, dated December 10, 1945, signed by J. M. Donaldson, and directed to the Postmaster, Los Angeles, California, relating to the mail of Al Williams;

Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System; or Williams Health System, and from in any manner stamping any of said mail with the words "Fraudulent: Mail to this address returned by order of the Postmaster General" or with any words to the same effect, or from returning any such mail to the senders thereof, or to the Division of Dead Letters of the United States Post Office, or from withholding from immediate delivery any mail directed to Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams, Health System; The Al Williams Health System; Williams Health System; or The Al Williams Health System of Los Angeles, Inc.; or to Al Williams under any similar designation, and also from failing or refusing to pay any postal money order drawn to the order of Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System; Williams Health System; or Al Williams Health System of Los Angeles, Inc.; or [47] to any thereof by said or any similar designation, and from informing the remitter of any such postal money order that payment thereof has been forbidden.

Dated: ~~April 30~~ May 6th, 1948.

PEIRSON M. HALL

Judge of the District Court

Judgment entered May 6, 1948. Docketed May 6, 1948. C. O. Book 50, page 530. Edmund L. Smith, Clerk; by J. M. Horn, Deputy. [48]

Received copy of the within Permanent Injunction this
rd May
3rd day of April 1948. James M. Carter, U. S. Atty.,
Attorney for Defendants; by Gertrude M. Johnson.

[Endorsed]: Filed May 6, 1948. Edmund L. Smith,
Clerk. [49]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that defendant above-named does
herewith and hereby appeal to the United States Circuit
Court of Appeals for the Ninth Circuit from the final
judgment and order made, rendered and filed in the
above-entitled court and cause on the 6th day of May,
1948, in favor of the plaintiffs and against the defendant
and from the whole of said judgment and order.

Dated this 21st day of June, 1948.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Assistant United States Attorney

BERNARD B. LAVEN

Assistant United States Attorney

Copy of the foregoing Notice of Appeal received this
25th day of June, 1948. Richard L. North, Attorney for
Plaintiffs.

[Endorsed]: Filed Jul. 2, 1948. Edmund L. Smith,
Clerk. [50]

[Title of District Court and Cause]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now the defendant above-named and, pursuant to the provisions of subdivision d of Rule 75 of the Federal Rules of Civil Procedure for the District Courts of the United States, files this designation of the points on which he intends to rely upon his appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, and specifies and designates said points as follows, to-wit:

1. That said District Court erred in granting the motion of plaintiffs for summary judgment;
2. That said District Court erred in rendering judgment for the plaintiffs;
3. That the District Court erred in holding that the order of the Postmaster General is not supported by any substantial evidence; [51]
4. That the District Court erred in holding that the expert opinion evidence of Mr. Putnam, a witness on behalf of the Post Office Department, is not substantial evidence to support the order of the Postmaster General;
5. That the District Court erred in issuing a permanent injunction against the defendant.

Dated this 12th day of July, 1948.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Assistant United States Attorney

BERNARD B. LAVEN

Assistant United States Attorney [52]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 12, 1948. Edmund L. Smith, Clerk. [53]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 56, inclusive, contain full, true and correct copies of Answer; Motion for Summary Judgment; Notice of Motion for Summary Judgment; Amended Answer; Motion to Strike Amended Answer; Notice of Motion to Strike Amended Answer; Minute Order Entered April 19, 1948; Memorandum; Findings of Fact and Conclusions of Law Following Plaintiffs' Motion for Summary Judgment; Order for Summary Judgment; Permanent Injunction; Notice of Appeal; Statement of Points on Appeal and Designation of Record on Appeal which, together with the Complaint and Exhibits thereto and the Amended Complaint and Exhibits thereto, heretofore certified as part of the record on appeal in case No. 11317 in the United States Circuit Court of Appeals for the Ninth Circuit, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 27 day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Endorsed]: No. 11998. United States Circuit Court of Appeals for the Ninth Circuit. Michael J. Fanning. Individually, and as Postmaster of the City of Los An-

geles, California, Appellant, vs. Al Williams and Al Williams Health System of Los Angeles, Inc., a corporation, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 28, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11998

MICHAEL J. FANNING, Individually, and as Postmaster of the City of Los Angeles, California,

Appellants,

vs.

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC., a corporation,

Appellees.

APPELLANTS' DESIGNATION OF PARTS OF
RECORD TO BE PRINTED AND STATE-
MENT OF POINTS INTENDED TO BE RE-
LIED ON

Appellants above named hereby designate for printing in the above matter the entire transcript, as certified by the Clerk of the United States District Court, except the "Transcript of Record" heretofore printed in No. 11317 in the United States Circuit Court of Appeals for the

Ninth Circuit, and request that this Transcript of Record be made a part of the record in this case, which record was heretofore certified by the Clerk of the United States District Court, and by this reference be incorporated in and made a part of the transcript of record.

Appellants hereby adopt as their points on appeal the "Statement of Points on Which Appellant Intends to Rely on Appeal" as filed in the said United States District Court and as included in Transcript of Record beginning with page 45 thereof, said Statement by this reference being incorporated in and made a part of this document.

Dated: August 9, 1948.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Assistant United States Attorney
Chief, Civil Division

BERNARD B. LAVEN

Assistant United States Attorney
Attorneys for Appellants

600 Federal Building
Los Angeles 12, California

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 10, 1948. Paul P. O'Brien,
Clerk.

No. 11998

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER
OF THE CITY OF LOS ANGELES, CALIFORNIA,

Appellant,

vs.

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF
LOS ANGELES, INC., A CORPORATION,

Appellees.

Appeal From the District Court of the United States
for the Southern District of California,
Central Division

APPELLANT'S OPENING BRIEF.

H. G. MORISON,
Assistant Attorney General,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
*Assistant United States Attorney,
Chief of Civil Division,*

BERNARD B. LAVEN,
Assistant United States Attorney,
600 Federal Building, Los Angeles 12,
Attorneys for Appellant.

Of Counsel:

EDWARD H. HICKEY,
Special Assistant to the Attorney General,

HOWARD C. WOOD,
Attorney, Department of Justice,

WILLIAM C. O'BRIEN,
Attorney, Post Office Department.

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No. 11998

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER
OF THE CITY OF LOS ANGELES, CALIFORNIA,

Appellant,

vs.

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF
LOS ANGELES, INC., A CORPORATION,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

Suit was filed in the United States District Court for the Southern District of California by the plaintiffs (appellees) against the defendant (appellant), the Postmaster at Los Angeles, to enjoin the enforcement of a Post Office fraud order theretofore issued against the plaintiffs.

The jurisdiction of the court below is based on Section 41(6), Title 28, United States Code. The amended complaint [Tr. p. 231]* in paragraph 1 alleges that the action arises under the Postal Laws of the United States, namely, the Postal Fraud Order Statutes U. S. C. A., Title 39,

*References to Transcript of Record in the previous appeal, being No. 11317, are designated herein as "Tr.," and the Record in the instant appeal, being No. 11998, are designated as "R."

Section 259, R. S., Section 3929; September 29, 1890, c. 908, Section 2, 26 Stat. 466, as amended. This suit was originally dismissed by the court below for failure to join the Postmaster General, the judgment being affirmed by this Court (No. 11,317), 158 F. 2d 95, but reversed by the United States Supreme Court (*Williams v. Fanning*, 332 U. S. 490).

Following this reversal, the plaintiffs moved for summary judgment, the District Court entered a final judgment, dated May 6, 1948, granting the plaintiffs' motion and rendering permanent the injunction against the defendant restraining enforcement of the fraud order [R. p. 41]. From such judgment the defendant has appealed [R. p. 44]. The District Court's opinion appears in the record at page 36. This Court has jurisdiction to review the judgment of the District Court under Section 128 of the Judicial Code, 28 U. S. C., Section 225.

Statement of the Case.

Plaintiffs for years have engaged in selling through the mails the so-called "Al Williams Reducing Plan," including certain tablets called "Foods That Take Hunger Away" and a preparation named "Special Body Massage Creme," represented as reducing excess fat without strict diet and without suffering the pangs of hunger and other discomfort. Plaintiffs advertise in newspapers and other publications circulated by mail throughout the United States, soliciting orders and remittances of money through the mails.

On May 25, 1945, the Postmaster General charged Al Williams, AL WILLIAMS, HEALTH CONDITIONER; AL WILLIAMS, PHYSICAL CONDITIONER; AL WILLIAMS HEALTH SYSTEM; THE AL WILLIAMS HEALTH SYSTEM,

and WILLIAMS HEALTH SYSTEM, with conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of Sections 3929 and 4041 of the Revised Statutes, as amended (39 U. S. C. 259 and 732), the scheme being described as follows:

“Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called ‘Foods That Take Hunger Away’ together with ‘Al Williams (weight) Reducing Plan’ and for a ‘Special Body Massage Creme’ upon pretenses, representations and promises contained in advertisements and in written and printed matter sent through the mails to the effect:

That obese persons will lose weight easily and safely through the use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;

That the said plan does not include a ‘strict diet’;

That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;

That a few days’ use of the said plan and tablets will result in the user’s loss of his desire to overeat and cause him to ‘feel full of pep and have more energy’;

That said ‘Special Body Massage Creme’ will eliminate ‘flabby flesh’ caused by the loss of weight; and

That the said ‘Creme’ will ‘beautify the contour of the throat, bust and upper arms, calves of legs and thighs’;

That the said tablets act as a 'general tonic' and their use will enable persons who have attained a normal body weight 'to remain physically fit':

Whereas, in truth and fact, said preparations and plan will not and cannot accomplish the results aforesaid, but all of the said pretenses, representations and promises are false and fraudulent." [Tr. pp. 219-221.]

In accordance with established practice, proceedings were instituted by service upon the plaintiffs of a notice to show cause returnable on June 20, 1945, why a fraud order should not issue. The hearing was held as scheduled on June 20, 1945. Plaintiffs were represented by counsel who filed a written answer denying the aforesaid charges [Tr. p. 221]. The transcript of the proceedings covers 190 pages exclusive of exhibits. Plaintiffs presented their witness and cross-examined the Government's witnesses [Tr. pp. 91-179].

The Solicitor's "Memorandum for the Postmaster General Embodying a Finding of Fact and Recommending the Issuance of a Fraud Order" [Tr. pp. 225, 226; App. pp. 1-9],* which stands uncontroverted, describes the Al Williams "Reducing Plan" as follows:

"The plan sold by the respondents for reducing the weight of obese persons consists of a restricted diet and a box of tablets to be taken with said diet. Chemical analysis shows the tablets to contain kelp, small quantities of sodium and potassium oxides, iron, calcium oxide, and a trace of iodine. Microanalysis dis-

*References to the Appendix of this brief are designated "App." and said Appendix sets forth for the convenience of the Court true and correct copies of the Solicitor's Memorandum for the Postmaster General, the fraud order and the Postal fraud statutes.

closed the presence in the tablets of alfalfa, wheat flour and soybean flour and small amounts of rhubarb root, parsley, spinach, lettuce, beet leaf, celery seed, capsicum fruit, carrot, asparagus, and animal meat tissues, and traces of yeast, kelp, and ginger rhizome. The 'Special Body Massage Creme' advertised and sold by the respondents was shown by a chemical analysis to contain phenol, menthol, camphor, eucalyptus, and water."

* * * * *

"the diet furnished by the respondents was a strict low-calorie diet supplying between 600 and 750 calories a day and that it would not be easy for an obese person, accustomed to eating more food, to follow such diet."

The plaintiffs' advertisements are quoted in the Solicitor's Memorandum [Tr. pp. 222-225; App. pp. 3-6] and represent:

Reducing Can Be Fun With Foods That Take Hunger Away Try This New Amazing Method! It's simple—easy to follow. No "Canary diets" or strenuous exercises.

Men! Women! Amazing New Way to Lose Weight with Foods That Take Hunger Away! Look younger! Feel Better! If you are overweight Send Now for proven plan that has helped thousands from coast to coast shrink 5 to 10 inches around the waist, bust, hips! Get rid of dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure and other symptoms due to excess weight. Send today for Free information on my proven Reducing Plan with Foods That Take Hunger Away. No starvation diets. No thyroid or harmful drugs. Not

sold in stores. Write Now for Free Data, Al Wil-
lian's Health System.

Reducing Can Be Fun With Foods That Take
Hunger Away—New Amazing Method! Look
Younger Feel Better.

No More "Canary-Bird" Diets or Back-Breaking
Exercises to Achieve Your Dream of Romantic Love-
liness!

Reducing Plan That Takes Hunger Away contains
No Drugs, No Medicines, No Thyroid Materials—in
Fact Nothing That Could Not Be Given to a Child
With Safety.

Reducing Is Made Easy, in a Sensible Way. It is
logical that if you cut down the amount of food
usually taken, you are bound to reduce. But the
problem arises that when you cut down on your food
intake, you become hungry, have a craving for more
food, and cannot diet without often injuring your
health. It is impossible to go very long on a rigid
diet. It Is Not Difficult to Stay With My Plan. It
is amazing what you will be able to do when you
Change your blood stream with Foods that bring you
down to your normal weight. Not only will you look
better, but you will Feel Better, more Animated and
More Vigorous.

It is adaptable to men and women and children of
all ages. Persons as young as 12 and as old as 80
have reported excellent results from any reducing
method.

These foods, contain 17 different fruits, minerals
and vegetables dehydrated into pleasant tasting tab-
lets. I usually suggest taking of them before meals,
and whenever you feel hungry during the day. You
will find that after a few days you will not crave to

overeat, and you will feel full of pep and have more energy. If you diet without taking these food supplements, you become too hungry, tired and nervous to stay with a low calorie diet long enough to lose weight.

The Special Body Massage Creme which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra pounds use to be. It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs.

This Creme acts as an astringent to take up the flabby flesh. Please understand that the Creme itself does not cause you to lose weight. I don't know of any Creme which will do that. But I have found astringents very valuable to firm the skin as the fat melts away. When used with massage, it tends to tighten the skin so that those pounds you lose won't leave "Sags" where extra pounds used to be. This creme is pleasant to use, and is readily absorbed. After weight reduction is brought about, the Concentrated Foods may be taken occasionally as a general tonic to remain physically fit. I am enclosing an Order Blank. If you have a friend, or if you wish to order more food, return the Order Blank in the enclosed envelope.

The medical expert witness for the Post Office Department testified only to matters of scientific factual knowledge constituting the consensus of such knowledge accepted by all orthodox schools of medicine. As hereinafter shown, this evidence factually demonstrated that the so-called

“Plan” involved a stringent diet [a reduction of intake of calories of 2,900 to 3,400 per day, R. pp. 123, 124], that “Foods That Take Hunger Away” were of such minute caloric value as to be ineffective in eliminating the pangs of hunger [10 tablets per day of 2 calories each, Tr. pp. 122, 123], and that the “Special Body Massage Creme” was useless in eliminating flabbiness resulting from weight reduction [being 75% water, Tr. p. 93]. This evidence was further supported by chemical and microanalyses of plaintiffs’ preparations, with which the medical expert was familiar [Tr. pp. 126, 127, 132, 133], and was based upon generally established dietary and physiological facts and the arithmetics of metabolism [Tr. p. 127]. It clearly showed the false and fraudulent nature of plaintiffs’ advertising and was uncontroverted by any contradictory medical or scientific evidence.

Plaintiff Al Williams, a former professional athlete, was the sole witness for the plaintiffs at the Post Office hearing. He was not qualified by education or scientific knowledge to testify as an expert concerning the medical scientific facts relevant to the case and this was conceded by his own lawyer [Tr. p. 162]:

“He is not testifying as a medical expert.”

Following the hearing and on December 10, 1945, the Postmaster General issued fraud order No. 29990 against Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System [Tr. pp. 257-258].

On January 7, 1946, the complaint was filed in the District Court, seeking an injunction restraining defendant,

Michael J. Fanning, the postmaster at the City of Los Angeles, from enforcing the fraud order [Tr. pp. 2-48]. The defendant then moved to dismiss on the ground that the Postmaster General was an indispensable party. Thereafter in *Williams v. Fanning*, 332 U. S. 490, the Supreme Court of the United States held that the Postmaster General was not an indispensable party to suits of this character. Whereupon plaintiffs moved for summary judgment and renewed their application for a permanent injunction against enforcement of the fraud order. The court below granted the motion and injunction [R. pp. 40-41]. Its memorandum opinion dated April 27, 1948, states [R. pp. 36-37]:

“Repeated examinations of the entire record of the proceedings before the postmaster general confirms the contention of the plaintiff that the only evidence in such record to support the order is the opinion evidence of one Putnam, who identified himself as a doctor employed full time by the Food and Drug Administration, who practiced medicine at night and odd times. .

“Under the rule of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, and the numerous cases following it, among which are *Jarvis v. Shackelton*, 136 Fed. 2nd 116, *Pinkus v. Walker*, 21 Fed. Supp. 610, and *Pinkus v. Walker*, 71 Fed. Supp. 993, mere opinion evidence is not substantial evidence to support such an order.

“The order of the postmaster general is not supported by any substantial evidence and was therefore beyond his lawful authority to issue and is void.

“Judgment will be for the plaintiff, who will prepare the appropriate Findings, Judgment and Perma-

nent Injunction. The Injunction now in force will remain in effect until the permanent injunction is issued."

On May 6, 1948, the District Court made findings of fact and conclusions of law [R. pp. 37-39], the pertinent finding being:

(1) That fraud order No. 29990 referred to in the pleadings and issued by the Postmaster General on December 10, 1945, was so issued and based upon opinion evidence.

The conclusions of law state:

WHEREUPON the court concludes as a matter of law:

I.

That the Postmaster General had no authority to issue the said fraud order and that it is void and of no effect, and that plaintiffs are entitled to judgment.

II.

That said fraud order was issued by the Postmaster General without substantial evidence to support it.

The defendant appeals from the judgment below issuing a permanent injunction and granting plaintiffs' motion for summary judgment and here seeks the reversal of that judgment, the vacation of the injunction and the dismissal of the action.

In brief, the lower court holds that there must be substantial evidence to support the issuance of a fraud order, that expert medical evidence, of a scientific factual nature, supported by chemical and microanalyses and uncontroverted by any other medical evidence, is "mere opinion"

evidence which cannot be substantial and hence the fraud order must fall. These assumptions raise the following questions:

Questions Involved.

(1) Whether the fraud order issued by the Postmaster General was supported by substantial evidence, and whether the court below followed accepted standards of judicial review.

(2) Whether the Postmaster General may treat mail addressed to the advertiser as fraudulent on finding that a mail order treatment for the cure of obesity will not produce the results represented to the purchaser.

(3) Whether the Postmaster General is without authority under the postal fraud statutes with respect to obesity treatments.

Statutes Involved.

POSTAL FRAUD ORDER STATUTES.

Section 259, Title 39, U. S. Code (Section 3929, Rev. Stats.), so far as pertinent, provides (complete text in Appendix):

“The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such matter to the postmaster at the office at which it was originally mailed, with the word ‘Fraudulent’ plainly written or

stamped upon the outside thereof * * * and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe."

Similarly, Title 39 U. S. C. 732 (R. S. 4041) provides in part (complete text in Appendix):

"The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders."

Specification of Errors.

1. That the District Court erred in holding that the order of the Postmaster General is not supported by substantial evidence;
2. That the District Court erred in holding that the expert evidence of Dr. Putnam, a witness on behalf of the Post Office Department, is not such substantial evidence;
3. That said District Court erred in granting the motion of plaintiffs for summary judgment;
4. That the District Court erred in issuing a permanent injunction against the defendant;
5. That said District Court erred in rendering judgment for the plaintiffs.

Summary of Argument.

I.

A postal fraud order will not be set aside if supported by substantial evidence.

II.

The fraud order issued herein was based on scientific fact, not mere opinion, and therefore was supported by substantial evidence.

Plaintiffs do not deny use of the mails for the circulation of the advertisements and solicitations of money set forth *supra*, page 2, nor dispute that such advertisements and solicitations as set forth in the Solicitor's Memorandum [Tr. pp. 222-225] are correctly reproduced. The sole issue is whether the evidence adduced to show that such advertisements and solicitations are false and fraudulent is substantial, not merely an opinion.

That evidence is demonstrable scientific and medical fact supported by chemical and microanalyses and uncontradicted by any demonstrable scientific or medical fact introduced by the plaintiffs. Representations that obesity may be lost without "strict" or "canary bird" diets and without the pain or discomfort resulting from pangs of hunger by the use of tablets ("Foods That Take Hunger Away") only containing two calories apiece [Tr. p. 123], clearly present as obvious questions of fact as any that may ever confront the Post Office Department. See *Cable v. Walker*, 152 F. 2d 23, 80 App. D. C. 283, cert. den. 328 U. S. 860; *Neher v. Harwood*, 128 F. 2d 846, 853 (C. C. A. 9);

Elliott Works, Inc. v. Frisk, 58 F. 2d 820 (S. D. Iowa). The reduction of caloric consumption from 4,000 per day to 600-750, as called for by the Williams' reducing "Plan" [Tr. pp. 123-124], is bound to create hunger and discomfort and infinitesimal caloric additions in the form of tablets will not relieve that discomfort [Tr. pp. 126, 127]. So clearly are these conclusions of fact based on generally accepted concepts of physiology and metabolism as to remove all doubt that the Postmaster General in any way founded the fraud order in issue on expressions of "mere opinion." The reduction of obesity, the issue of caloric intake, the food value of plaintiffs' tablets established by chemical and microanalyses, the dangers of radical reduction in weight to general health are all matters of established fact constituting substantial evidence on which the Postmaster General could rely under the current authorities. For the lower court to label uncontroverted testimony on these facts as "opinion" prevents the Postal officials from prohibiting victimization of the public in the profitable field of weight reduction. The unfortunate precedent established by the court below should be reversed.

ARGUMENT.

POINT I.

A Postal Fraud Order Will Not Be Set Aside if Supported by Substantial Evidence.

In reviewing the record under the postal fraud order laws [App. pp. 10-11], the District Court was not called upon to make independent findings whether plaintiff was engaged in a fraudulent enterprise, but rather to determine whether the Postmaster General had evidence to sustain his fraud order. A finding of the Postmaster General will not be set aside by the courts "where it is fairly arrived at and has substantial evidence to support it, so that it cannot be said to be palpably wrong and therefore arbitrary." *Leach v. Carlile*, 258 U. S. 138, 140; *New v. Tribond Sales Corporation*, 19 F. 2d 671, 57 App. D. C. 197, cert. den. 275 U. S. 550. As said by the court in *Farley v. Heininger*, 105 F. 2d 79, 81 cert. den. 308 U. S. 587:

"The conclusion of the Postmaster General is presumptively correct and 'will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary.'"

Only when the head of the executive department has exceeded his authority under the statute, or when his action is palpably wrong, is his decision subject to review by the courts. *Public Clearing House v. Coyne*, 194 U. S. 497, 509; *National Conference on Legalizing Lotteries, Inc. v. Farley*, 96 F. 2d 861, cert. den. 305 U. S. 624; *New v. Tribond Sales Corp.*, 19 F. 2d 671, cert. den. 275 U. S. 550; *Plapao Laboratories, Inc. v. Farley*, 92 F. 2d 228, cert. den. 302 U. S. 732; *People's United States Bank v. Gilson*, 161 Fed. 286 (C. C. A. 8); *Branaman v. Har-*

ris, 189 Fed. 461 (C. C. W. D. Mo.); *Missouri Drug Co. v. Wyman*, 129 Fed. 623 (C. C. E. D. Mo.).

The court cannot substitute its judgment for that of the Postmaster General, even though exercising an independent judgment it might reach a different conclusion. *Enterprise Savings Association v. Zumstein*, 67 Fed. 1000 (C. C. A. 6); *Putnam v. Morgan*, 172 Fed. 450 (S. D. N. Y.). Unless there is no evidence whatever which reasonably supports the Postmaster General's conclusions, enforcement of the fraud order may not be enjoined. *National Conference on Legalizing Lotteries, Inc. v. Farley*, 96 F. 2d 861, 68 App. D. C. 319, cert. den. 305 U. S. 624.

Both in reviewing the Postmaster General's findings and in considering applications for preliminary injunctive orders, the courts have been guided by the consideration expressed by Judge Hutcheson in *Crane v. Nichols*, 1 F. 2d 33:

"* * * the statute authorizing fraud orders was aimed at such a beneficial purpose that only in the extremest cases should courts interfere with their issuance."

See:

Branaman v. Harris, 189 Fed. 461, 471;

Hall v. Willcox, 225 Fed. 333;

Sanden v. Morgan, 225 Fed. 266, 269.

In denying an application for an injunction restraining enforcement of a fraud order in *Putnam v. Morgan*, 172 Fed. 450 (C. C. S. D. N. Y.),¹ Judge Learned Hand, after

¹Cited with approval in *Farley v. Heininger*, 105 F. 2d 79, cert. den. 308 U. S. 587, and *Farley v. Simmons*, 99 F. 2d 343, cert. den. 305 U. S. 651, reh. den. 305 U. S. 676.

stating, "I am not at all sure that I should have found the complainant's business fraudulent, if it had come before me for an independent decision," said (p. 451) :

"The sole question is whether he has exceeded the functions which the statute gives him. If he has not, he has committed no tort which I may enjoin. I should have thought that it was enough for him to plead that the 'fraud order' was the result of his being 'satisfied' upon a bona fide inquiry that a fraud was being practiced. * * * His decision on the facts is final, if there be any evidence at all on which he may act."

Since there was a fair hearing, no mistake of law, and an order grounded on substantial evidence, the Postmaster General's determination should not have been annulled and no injunction should have issued against his subordinate, the Postmaster. *Leach v. Carlile*, 258 U. S. 138; *Farley v. Heininger*, 105 F. 2d 79, 70 App. D. C. 200, cert. den. 308 U. S. 587; *Pike v. Walker*, 121 F. 2d 37, 73 App. D. C. 289, cert. den. 314 U. S. 625, reh. den. 314 U. S. 710; *Eugene Cable v. Walker*, 152 F. 2d 23, 80 App. D. C. 283, cert. den. 328 U. S. 860; *Farley v. Simmons*, 99 F. 2d 343, 69 App. D. C. 110, cert. den. 305 U. S. 651; *Aycock v. O'Brien*, 28 F. 2d 817 (C. C. A. 9); *Wheeler v. Farley*, 7 Fed. Supp. 433 (S. D. Calif.), appeal dismissed 293 U. S. 526; *Elliott Works, Inc. v. Frisk*, 58 F. 2d 820 (S. D. Iowa); *Acret v. Harwood*, 41 Fed. Supp. 492 (S. D. Calif.).

POINT II.

The Fraud Order Issued Herein Was Based on Scientific Fact, Not Mere Opinion, and Therefore Was Supported by Substantial Evidence.

The crux of the ruling below is found in the following language [R. p. 37]:

. “Under the rule of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, and the numerous cases following it, among which are *Jarvis v. Shackelton*, 136 F. 2d 116, *Pinkus v. Walker*, 21 Fed. Supp. 610 and *Pinkus v. Walker*, 71 Fed. Supp. 993, mere opinion evidence is not substantial evidence to support such an order.

“The order of the postmaster general is not supported by any substantial evidence and was therefore beyond his lawful authority to issue and is void.”

This obeisance to a misapprehension of the rule of the *McAnnulty* case, decided in 1902, ignores the progress of science and the recognition that what may once have been the subject of difference in medical opinion, has now become the subject of scientifically established fact. If the view of the lower court be upheld, the Postmaster General will never be able to prevent victimization of the public through mail order schemes for the treatment of disease or the reduction of obesity, no matter how misrepresented. Medical evidence will need to be relied upon and, in the view of the lower court, this will never constitute “substantial evidence.” Such a road-block to protection of the public welfare does not represent the view of this court nor

the weight of authority.² To the extent that the court below holds that medical misrepresentations are beyond reach of the postal fraud sections, it not only misapprehends the import of the *McAnnulty* case but completely ignores the later decision in *Leach v. Carlile*, 258 U. S. 138.

Ready comprehension of the error of the court below in denominating as "mere opinion" the substantial factual evidence upon which the Postmaster General acted is obtained by reference to plaintiffs' representations and the medical and scientific facts adduced at the Post Office hearing showing the falsity of such representations. Thus, plaintiffs represent through the mails that: (1) Strict diet is not required, *i. e.*, no "canary diet," no "starvation diet," no more "canary-bird diet" [Tr. p. 222]; (2) Obese persons will lose weight easily and safely regardless of age, the advertising failing to indicate that rapid weight reduction is harmful to health in certain instances [Tr. p. 222]; (3) the tablets "Foods That Take Hunger Away" prevent those using the Reducing Plan from becoming

²The Government could not protect against victimization and it would be open season for quacks, charlatans, and faddists dispensing expensive innocuous or dangerous drugs through the mails. The Postmaster General may rely on expert medical testimony that a product has no value. *J. E. Todd, Inc. v. Federal Trade Commission*, 145 F. 2d 858, 79 App. D. C. 288; *Justin Haynes v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2); cert. den. 308 U. S. 616; *Charles of the Ritz Distributing Corp. v. Federal Trade Commission*, 143 F. 2d 676 (C. C. A. 2); *Associated Laboratories v. Federal Trade Commission*, 150 F. 2d 629 (C. C. A. 2—Kelp-A-Malt for underweight); *Dr. W. B. Caldwell v. Federal Trade Commission*, 111 F. 2d 889 (C. C. A. 7); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165 (C. C. A. 7); *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85 (C. C. A. 9), cert. den., 317 U. S. 679; *United States v. One Device*, 160 F. 2d 194, 198-9 (C. C. A. 10). See also *Research Laboratories, Inc. v. United States*, 167 F. 2d 410 (C. C. A. 9, 1948).

hungry and after a few days' use will cause the user to feel "full of pep and have more energy" [Tr. pp. 223, 224]; (4) if the Williams' Reducing "Plan" is followed, losses of 10 pounds in 3 days, 35 pounds in 30 days and 73 pounds in 6 months are not rare exceptions [Tr. p. 117]; (5) that the "Special Body Massage Creme" will eliminate "flabby flesh" caused by loss of weight and will beautify the contour of the user's throat, bust, and upper arms, calves of legs and thighs [Tr. pp. 224, 225].

The factual scientific and medical evidence adduced by the Post Office Department showed that: (1) the principal cause of overweight is eating more food than the activities of one's body demand [Tr. p. 107]; (2) the average obese person consumes 3,500 to 4,000 calories per day [Tr. p. 123]; (3) plaintiffs' "Plan" contemplates a reduction of daily intake to between 600 and 750 calories per day and thus is a strict diet [Tr. pp. 121, 122]; (4) this sharp reduction in diet and the loss of weight contemplated and advertised by the plaintiffs would endanger health in some instances, such as where the purchaser of the Plan had suffered from previous tuberculosis or was a diabetic [Tr. pp. 110, 119, 120, 121]; (5) while the general principles of reducing are the same, the details should vary with age, sex, occupation, previous and present diseases, physical examination and laboratory tests [Tr. p. 121]; (6) the "Foods That Take Hunger Away" would not prevent those following the "Plan" from suffering the pangs of hunger which are due to stomach contractions and such tablets containing only two calories apiece and weighing 7/10ths of a gram would not stop such contractions [Tr. pp. 126, 127, 128, 134, 152]; (7) the taking of these "Food" tablets would not give pep and energy [Tr. p. 128]; and (8) the "Special Body Massage Creme" would

not eliminate “flabby flesh” resulting from loss of weight nor “beautify” the user’s contours [Tr. pp. 133, 134] consisting, as it does, of 75% water [Tr. p. 93].

No contradictory medical nor scientific evidence was introduced. Not only did plaintiffs’ counsel concede the qualifications of the Postal Department witnesses [Tr. p. 106], but the evidence adduced represented the general consensus of modern medical knowledge [Tr. p. 135] and was based upon demonstrable chemical and microanalyses of plaintiffs’ “Food” tablets and “Special Body Massage Creme” [Tr. pp. 126, 127, 132, 133, 134].

It is obvious from the foregoing that the plaintiffs represented, through use of the mails, a panacea for weight reduction irrespective of age, sex or condition of health, without starvation and consequent discomfort. This panacea, as described in plaintiffs’ advertisements, was refuted by scientific medical evidence, the most important and pertinent parts of which expressed conclusions based on well-proven medical, pharmacological and physiological knowledge established upon scientific bases and accepted in all orthodox medical quarters.

Under such circumstances, this factual refutation of plaintiffs’ claimed panacea for obesity falls within the rule of *Leach v. Carlile*, 258 U. S. 138 (1921), in which the Supreme Court stated:

“* * * it is sufficient to say that the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpe-

trating a fraud upon the public. This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary."

Further, the authorities upon which the court below relied do not sustain its ruling. In the *McAnnulty* case the Supreme Court decided the case on a demurrer admitting the allegations of the Complaint—it reversed a judgment sustaining the demurrer and granted defendant leave to answer. The *McAnnulty* case involved a scheme for curing disease by mental suggestion at a time when knowledge of the underlying principles was largely undeveloped and there had been no crystallization of scientific opinion. *Farley v. Simmons*, *supra*, 99 F. 2d 343 at 347; *Missouri Drug Co. v. Wyman*, 129 Fed. 623, 627 (C. C. E. D. Mo.); *Appleby v. Chuss*, 160 Fed. 984, 986 (C. C. N. J.). The decision cannot be construed to deny that scientific advances have removed an infinite number of exaggerated claims from the realm of opinion. See *Leach v. Carlile*, 258 U. S. 138; *Farley v. Heininger*, 105 F. 2d 79, 84, 70 App. D. C. 200, cert. den., 308 U. S. 587; *Randle v. United States*, 113 F. 2d 945, 949, 72 App. D. C. 368, cert. den., 311 U. S. 683; *Aycock v. O'Brien*, 28 F. 2d 817 (C. C. A. 9); *United States v. 7 Jugs of Dr. Salsbury's Rakos*, 53 Fed. Supp. 746, 757-8 (D. Minn.); *cf. United States v. Olsen*, 161 F. 2d 669 (C. C. A. 9—Spectrochrome libel).

Also, as recognized by this court in the recent case of *Research Laboratories, Inc. v. United States*, 167 F. 2d 410, 414, the court in the *McAnnulty* case conceded that the Postmaster General "might make a showing that fraud was being committed."

In the instant case the medical expert evidence presented by the Post Office Department was confined to scientifically established facts and, together with other evidence, constituted "a showing that fraud was being committed" by the plaintiffs.

The plaintiffs' representations and the factual refutation of their honesty, shown above, represents no "mere opinion." The nature of the physiological, dietary, nutritional and medical facts constituting the Post Office evidence represents the consensus of recognized medical knowledge. No stronger showing of fraud could possibly be made.

Further, as indicated in *Research Laboratories, Inc. v. United States*, 167 F. 2d 410, 414 (C. C. A. 9th, 1948), throughout the Supreme Court opinion in the *McAnnulty* decision "doubt was expressed as to the qualifications of a Postmaster General to pass on medical questions." This court, in distinguishing the *McAnnulty* case, then said:

"In contrast to the meager technical facilities for the determination of medical questions possessed by the Postmaster General—at least at the time that the *McAnnulty* case was decided—we find that the Federal Security Agency has at its disposal almost unlimited professional resources with which to carry out its investigations in the enforcement of the Federal Food, Drug and Cosmetic Act of June 25, 1938."

Today, this ground of distinction is as applicable to Post Office proceedings against schemes for the treatment of disease or obesity as it is to proceedings instituted upon the request of the Federal Security Agency. For some time the Post Office Department has availed itself of the "unlimited professional resources" of the Food and Drug Administration, Federal Security Agency, and did so in the instant case. Casey, the chemical analyst, is employed by the Food and Drug Administration [Tr. p. 91] as is Eisenberg, the microanalyst [Tr. p. 94] and Dr. Lawrence Putnam, the medical expert [Tr. p. 103]. Hence, the Postmaster General is no longer limited to "meager technical facilities" and, hence, the rule of the *McAnnulty* decision should no longer apply.

Similarly, *Jarvis v. Shackelton Inhaler Co.*, 136 F. 2d 116 (C. C. A. 6th), does not support the ruling of the lower court. On the contrary the Sixth Circuit applied the correct principles. The court examined and weighed the record and found no substantial evidence to support the fraud order. The medical proof on which the Post Office Department relied was adduced on the basis of an incomplete analysis of the preparation in question and involved proof of *medical opinion* as distinguished from *medical fact*. The court also held that the Post Office Department failed to show that the promoter was making the claims that the Department charged he was making, in effect, that the Department's interpretation of the advertising literature could not be sustained. No comparable situation exists here. The representations in plaintiff's advertising are plain, and the hearing was devoted to a settled field of medical science.

In this case, complete analyses of the plaintiffs' tablets and "Massage Creme" were made and the medical evidence

was premised upon such analyses [Tr. pp. 91-95; 126, 127, 132, 133]. Nor do the *Pinkus v. Walker* decisions cited by the court below afford any comfort to the plaintiffs. In those cases, there was at least a purported divergence of medical evidence as to the efficacy of the plaintiffs' medicinal preparation to be used in weight reduction. Significantly, no contrary medical or other scientific evidence was brought forth at the Post Office hearing in this case. Such an omission may well be considered a confession of the accuracy of the scientific factual evidence presented by the Post Office Department. As was stated in *United States v. 50¾ Dozen Bottles, more or less, of Sulfa-Seb*, 54 Fed. Supp. 759:

"The scientific testimony in a case of this character is the testimony that counts. Scientific testimony is available to support any meritorious cause. * * * Of course, scientific testimony is available to the Government in support of any meritorious cause presented by the Government. * * * *But private individuals are also able to obtain the testimony of outstanding men of science provided there is real merit in their cause.* * * *

* * * * *

"There was a reason for the complete failure of the claimants to support their contentions by outstanding expert testimony. That testimony just was not procurable. The failure of the claimants in this respect impressed us as almost the equivalent of a confession of the general accuracy of the testimony of the Government's experts." (Italics ours.)

The weight of authority—including the decisions of this court—have appreciated that the *McAnnulty* decision was not intended to shackle the powers of the Postmaster Gen-

eral to afford consumer protection in every instance of misuse of the mails for medical schemes. It has been recognized that that decision cannot be construed as denying that scientific advances have removed from the realm of opinion an infinite number of exaggerated claims, the falsity of which are now demonstrable matters of fact.

This is succinctly stated in *United States v. 7 Jugs, etc., of Dr. Salsbury's Rakos*, 53 Fed. Supp. 747, 759 (D. Minn., 1944), wherein the court stated:

"Facts established by recognized scientific investigation are deserving of high standing in respect to the falsity of claims of effectiveness. *Elliott Works v. Frisk*, D. C. Iowa 1932, 58 F. 2d 820, 824, 825; cf. *United States v. Lesser*, 2 Cir., 1933, 66 F. 2d 612, 616. Moreover, it must be obvious that tremendous advancements in scientific knowledge and certainty have been made since the rule in the *McAnnulty* case was first announced. Questions which previously were subjects only of opinion have now been answered with certainty by the application of scientifically known facts. In the consideration of the *McAnnulty* rule, courts should give recognition to this advancement."

And in *Elliott Works, Inc. v. Frisk*, 58 F. 2d 820 (S. D. Iowa, 1932), cited with approval by this court in the *Research Laboratories, Inc.* case, *supra*, the court, in sustaining the validity of a postal fraud order, held the rule of the *McAnnulty* decision inapplicable, saying (p. 825):

"The facts here are entirely different from what they are in that case, which arose on a demurrer wherein all the material facts averred in the bill were admitted for the purpose of the hearing. It may be conceded that the court there held that mere matters of opinion on which witnesses might vary in their con-

clusions would not substantiate a fraud order such as is here under consideration; but the finding of the solicitor in this case is not based on opinions, but upon a scientific investigation, findings, and tests made by the United States Bureau of Standards. Opinions of experts when founded upon known scientific facts are not to be considered the same as opinions of laymen, but are considered by the courts as substantive evidence."

In this case, the testimony of Dr. Putnam, Post Office medical expert, was no matter of mere opinion. Scientific investigation and tests of "Foods That Take Hunger Away" and the "Special Body Massage Creme" had been made by accredited representatives of the Food and Drug Administration. Important parts of Putnam's testimony were based upon the scientific facts established as the result of these tests and, hence, such testimony in the words of the *Frisk* decision "are considered by the courts as substantive evidence."

In *Cable v. Walker*, 152 F. 2d 23 (App. D. C.), the court states:

"After serving the appellants with notice of the specific charges against them, the Postmaster General went forward with hearings at which considerable testimony was given by expert government witnesses to the effect that appellants preparation was incapable of producing the results claimed. *This testimony was directed toward an analysis of the chemical contents of the product, and a review of the professional opinion on the matter of treatment of pyorrhea.*

* * * We consider the evidence upon which the Postmaster General predicated the fraud order to be 'substantial in the strongest meaning of the word.'"
(Italics ours.)

Similarly, this court, in *Fulton v. Federal Trade Commission*, 130 F. 2d 85, cert. den. 317 U. S. 679, in reviewing an order to desist from advertising a product as an effective cure for diabetes, stated:

“The findings have support in the testimony of expert witnesses called by the Commission. But the petitioner argues that since none of the experts had prescribed Uvursin or observed its effects in concrete cases their testimony was incompetent and inadmissible. We think otherwise. The witnesses were shown to possess wide knowledge in the field under inquiry. There is no good reason to suppose them incompetent to express an opinion as to the lack of therapeutic value of petitioner’s preparation merely because they had had no personal experience with it in the treatment of the disease. Their general medical and pharmacological knowledge qualified them to testify.”

See also *Hall v. United States*, 267 Fed. 795, 798 (C. C. A. 5); *United States v. Chichester Chemical Co.*, 298 Fed. 829, 832 (App. D. C.); *Haynes v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2); *Neff v. Federal Trade Commission*, 117 F. 2d 495 (C. C. A. 4); *Alberty v. Federal Trade Commission*, 1941, 118 F. 2d 669 (C. C. A. 9), cert. den. 314 U. S. 630; *United States v. One Device*, 160 F. 2d 194, 199 (C. C. A. 10); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 678; *Goodwin v. United States*, 2 F. 2d 200, 201 (C. C. A. 6); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7).

Nor can it be said that the lower court's ruling should be sustained because founded upon distrust of the factual medical knowledge of Dr. Putnam, the medical expert. While the memorandum opinion below refers to him as "one Putnam, who identified himself as a doctor employed full time by the Food and Drug Administration, who practiced medicine at night and odd times," this should not be construed as indicating that the court was either dissatisfied with his qualifications or was passing upon the weight of his testimony as a basis for holding that his evidence was "mere opinion" and "not substantial evidence." In *Haynes v. Federal Trade Commission*, 105 F. 2d 988 (C. C. A. 2), the court referred to the fact that the medical witnesses before the Commission were well qualified expert witnesses who "based their opinions upon their general medical and pharmacological knowledge." The Circuit Court upheld the right of the Commission to accept the testimony of these witnesses as "substantial evidence to support the Commission's findings" stating further:

"That this court is not permitted to pass upon the weight of the evidence is too well established to require the citation of authorities."

Further, Dr. Putnam's qualifications, as recited in the record [Tr. pp. 103-106], show beyond question the wide extent of his medical knowledge on the issues presented here.

In brief outline, he received his M. D. degree at Harvard University Medical School in 1934. After interning in several hospitals in Boston, Massachusetts, he was on ac-

tive medical duty with the United States Army assigned to the Civilian Conservation Corps. From 1939 until January, 1941, he was medical officer for the Veteran's Administration, Washington, D. C. Since January, 1941, he has been employed by the Food and Drug Administration (Federal Security Agency). He is licensed to practice medicine in Maine, Massachusetts and the District of Columbia, where he was practicing at the time of the hearing, seeing patients by appointment so as not to conflict with his duties as an officer of the Food and Drug Administration. His specialty is internal medicine, which includes the study and treatment of obesity [Tr. p. 107]. He is a clinical instructor in medicine at George Washington University School of Medicine, Washington, D. C., as well as Associate Visiting Physician at Gallinger Hospital [Tr. p. 104]. At the time of the hearing he was an Associate of the American College of Physicians, a national organization which admits only those whose education, training and demonstrated ability as doctors conform to the highest standards of the profession.

Counsel for plaintiffs at the Post Office Department hearing conceded on the record the qualifications of Dr. Putnam as an expert witness [Tr. p. 106]. He was accepted as a qualified expert witness by the Trial Examiner and also by the Postmaster General.

Conclusion.

Casual perusal of current newspapers and periodicals impresses the reader with the plethora of advertisements offering panaceas for obesity. Williams is just another of the many advertisers who promise what every obese person hopefully seeks—an easy, comfortable, effortless, hungerless way to lose weight rapidly and pleasantly. The medical fact and truth is, as shown by the evidence, that reduction of food intake below energy requirements is the only way to reduce and hunger, both painful and discouraging, will necessarily be present. Nor will tablets of two calories each, weighing less than one gram, even when swallowed with 100 calorie glasses of fruit juice, assuage the hunger of an appetite which demands 4,000 calories instead of the 750 which this "Plan," at best, prescribes.

Incidental to the fraud was Williams' pretense that the 2 calorie alfalfa tablets would give hunger relief when he must have known that such brief relief as might be experienced from their use would be derived from the sugary fruit juices or the fatty soups taken therewith.

The court below misapprehended the scope of the Postmaster General's authority under Title 39 U. S. C. 259 and 732 and construed them so narrowly as to deny him any power to purge the mails of fraudulent obesity reduction schemes. The court below also misapprehended both the character of the evidence and the rule of the *McAnulty* decision and in so doing failed to follow *Leach v. Carlile*, 258 U. S. 138, and numerous other ruling cases, including decisions of this Court.

The judgment below and the injunction issued were erroneous. The judgment should be reversed, the action dismissed, and the injunction vacated.

Respectfully submitted,

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JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
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Chief of Civil Division,*

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Attorney, Post Office Department.

APPENDIX.

[Copy]

POST OFFICE DEPARTMENT

OFFICE OF THE SOLICITOR

WASHINGTON 25, D. C., December 6, 1945.

F. & L. Docket 14/381

IN THE MATTER OF CHARGES THAT AL WILLIAMS, AL WILLIAMS, HEALTH CONDITIONER, AL WILLIAMS, PHYSICAL CONDITIONER, AL WILLIAMS HEALTH SYSTEM, THE AL WILLIAMS HEALTH SYSTEM, AND WILLIAMS HEALTH SYSTEM, AT LOS ANGELES, CALIFORNIA, ARE ENGAGED IN CONDUCTING A SCHEME FOR OBTAINING MONEY THROUGH THE MAILS BY MEANS OF FALSE AND FRAUDULENT PRETENSES, REPRESENTATIONS AND PROMISES, IN VIOLATION OF 39 U. S. CODE 259 AND 732 (SECTIONS 3929 AND 4041 OF THE REVISED STATUTES, AS AMENDED).

MEMORANDUM FOR THE POSTMASTER GENERAL EMBODYING A FINDING OF FACT AND RECOMMENDING THE ISSUANCE OF A FRAUD ORDER.

A hearing was held before this office in the above entitled case on June 20, 1945. The transcript of the proceedings is hereby made a part hereof. Proceedings were instituted by the service on respondents of a notice to show cause why a fraud order should not be issued against the names set forth in the caption hereof, stating the time and place of hearing, together with the specification of charges which as amended reads as follows [R. 2-9]:

It is charged that the above named party and concerns are engaged in conducting a scheme for obtain-

ing money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), which said scheme is in substance and effect as follows:

Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called "Foods That Take Hunger Away" together with "Al Williams (weight) Reducing Plan" and for a "Special Body Massage Creme" upon pretenses, representations and promises contained in advertisements and in written and printed matter sent through the mails to the effect;

That obese persons will lose weight easily and safely through use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;

That the said plan does not include a "strict diet";

That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;

That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat and cause him to "feel full of pep and have more energy";

That said "Special Body Massage Creme" will eliminate "flabby flesh" caused by the loss of weight; and

That the said "Creme" will "beautify the contour of the throat, bust and upper arms, calves of legs and thighs";

That the said tablets act as a "general tonic" and their use will enable persons who have attained a normal body weight "to remain physically fit";

Whereas, in truth and in fact, said preparations and plan will not and cannot accomplish the results aforesaid, but all of the said pretenses, representations and promises are false and fraudulent.

The respondents were represented by counsel at the hearing and the respondent Al Williams appeared in person. A written answer was filed by the respondents, in which the aforesaid charges are denied. Subsequent to the hearing, a copy of the transcript was furnished to the respondents and a brief and supplemental brief were filed by them.

On the basis of the entire record I find the following to be the facts in this case:

All of the names listed in the caption hereof are used by the respondents in conducting their business through the mails from Los Angeles, California.

The reducing "plan" sold through the mails by the respondents is advertised in periodicals of national circulation and by written and printed matter sent through the mails. The following are excerpts taken from the printed circulars of the respondents:

Reducing Can Be Fun With Foods That Take Hunger Away. Try This New Amazing Method! It's simple—easy to follow. No "Canary diets" or strenuous exercises. [Gov. Ex. 1-A.]

Men! Women! Amazing New Way to Lose Weight with Foods That Take Hunger Away! Look younger! Feel Better! If you are overweight Send Now for proven plan that has helped thousands from coast to coast shrink 5 to 10 inches around the waist, bust, hips! Get rid of dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure and other symptoms due to excess weight. Send to-day for Free information on my proven Reducing Plan with Foods That Take Hunger Away. No starvation diets. No thyroid or harmful drugs. Not sold in stores. Write Now for Free Data, Al Williams Health System. [Gov. Ex. 1-B.]

Reducing Can Be Fun With Foods That Take Hunger Away—New Amazing Method! Look Younger Feel Better.

No More “Canary-Bird” Diets or Back-Breaking Exercises to Achieve Your Dream of Romantic Loveliness! [Gov. Ex. 1-D.]

Reducing Plan That Takes Hunger Away contains No Drugs, No Medicines, No Thyroid Materials—in Fact Nothing That Could Not Be Given to a Child With Safety. [Gov. Ex. 2-C-3.]

Reducing Is Made Easy, in a Sensible Way. It is logical that if you cut down the amount of food usually taken, you are bound to reduce. But the problem arises that when you cut down on your food intake, you become hungry, have a craving for more food, and cannot diet without often injuring your health. It is impossible to go very long on a rigid diet. It Is Not Difficult to Stay With My Plan. It is amazing what you will be able to do when you

Change your blood stream with Foods that bring you down to your normal weight. Not only will you look better, but you will Feel Better, more Animated and More Vigorous. [Gov. Ex. 2-C.]

It is adaptable to men and women and children of all ages. Persons as young as 12 and as old as 80 have reported excellent results from my reducing method. [Gov. Ex. 2-C-3.]

These foods, contain 17 different fruits, minerals and vegetables dehydrated into pleasant tasting tablets. I usually suggest taking of them before meals, and whenever you feel hungry during the day. You will find that after a few days you will not crave to overeat, and you will feel full of pep and have more energy. If you diet without taking these food supplements, you become too hungry, tired and nervous to stay with a low calorie diet long enough to lose weight. [Gov. Ex. 2-C-3.]

It is possible that you have tried before to get rid of unwanted fat. Perhaps you have enthusiastically embarked on some kind of "diet" suggested to you by a well-meaning friend. Perhaps you have tried bending and squatting and stooping, or you may have bought gadgets or rollers or other contrivances guaranteed to make the fat "melt away like magic." [Gov. Ex. 2-C-1.]

The Special Body Massage Creme which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra

pounds used to be. It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs. [Gov. Ex. 2-C.]

This Creme acts as an astringent to take up the flabby flesh. Please understand that the Creme itself does not cause you to lose weight. I don't know of any Creme which will do that. But I have found astringents very valuable to firm the skin as the fat melts away. When used with massage, it tends to tighten the skin so that those pounds you lose won't leave "Sags" where extra pounds used to be. This Creme is pleasant to use, and is readily absorbed. [Gov. Ex. 2-C-3.]

Time passes quickly. If you are really serious and follow the suggestions given, you should be amply paid in securing the results desired. If you have only had one order of the Concentrated Foods, please bear in mind that it may require several more packages to secure the results desired. I suggest that you continue the plan, so now that you have started you will not lose the benefits already attained.

After weight reduction is brought about, the Concentrated Foods may be taken occasionally as a general tonic to remain physically fit. I am enclosing an Order Blank. If you have a friend, or if you wish to order more food, return the Order Blank in the enclosed envelope. [Gov. Ex. 4-F.]

The plan sold by the respondents for reducing the weight of obese persons consists of a restricted diet and a box of tablets to be taken with said diet. Chemical analysis shows the tablets to contain kelp, small quantities of sodium and

potassium oxides, iron, calcium oxide, and a trace of iodine. Microanalysis disclosed the presence in the tablets of alfalfa, wheat flour and soybean flour and small amounts of rhubarb root, parsley, spinach, lettuce, beet leaf, celery seed, capsicum fruit, carrot, asparagus, and animal meat tissues, and traces of yeast, kelp, and ginger rhizome. The "Special Body Massage Creme" advertised and sold by the respondents was shown by a chemical analysis to contain phenol, menthol, camphor, eucalyptus, and water. [Tr. 46, 47, 50, 52; Gov. Ex. 4.]

There appeared on behalf of the Government an expert medical witness fully qualified by education and experience to give testimony concerning the medical issues involved in this case. [Tr. 59-64.] This witness gave extensive testimony concerning the condition of obesity and its causes, and the proper scientific treatment thereof. [Tr. 64-75.] He testified that the diet furnished by the respondents was a strict low-calorie diet supplying between 600 and 750 calories a day [Tr. 81, 84] and that it would not be easy for an obese person, accustomed to eating more food, to follow such diet. [Tr. 80-92.] His testimony shows also that it would not be safe for persons with certain diseases and conditions and at certain ages to reduce as rapidly as might be done by following the diet of the respondents. [Tr. 78-89.]

The medical expert testified that the tablets furnished by the respondents, the ingredients of which he knew from the chemical analysis and the microanalysis, would be of no value in the treatment of obesity; and that any weight reduction accomplished by following the "plan" of the respondents would result solely from the low-calorie diet. [Tr. 87-92.] He stated that said tablets would not elimi-

nate or relieve the hunger experienced by an obese person while following the low-calorie diet prescribed by the respondents. [Tr. 86-92.] By the respondents' directions the user is limited to ten tablets daily. [Gov. Ex. 4-D-1.] The tablets weigh less than a gram each and supply about two calories each. [Tr. 83-87.] The average obese person consumes from 3500 to 4000 calories daily. [Tr. 83.] The expert testimony shows that the tablets will not furnish energy or "pep", are not a "general tonic", and will not keep one "physically fit." [Tr. 88.]

The evidence shows that after one loses a considerable amount of weight his skin becomes flabby, and this flabbiness will remain in mature people but may disappear to some extent in young people. The medical expert knew the ingredients of the "Special Body Massage Creme" sold by the respondents, from the chemical analysis thereof. He testified positively that massage with said creme would have no effect whatever, regardless of how long used, upon the flabby condition resulting from reduction in weight, or upon the contour of the throat, bust and upper arms, calves of legs and thighs. [Tr. 93-95.]

The respondents offered no expert medical testimony. The respondent Al Williams testified in his own behalf but was not permitted to give testimony concerning the efficacy of his "plan" in reducing obesity because he was not qualified to give expert medical testimony.

Subsequent to the hearing in this case, and after a copy of the transcript of the hearing had been furnished to the respondents, notice was received by this office from the respondents that another attorney had been substituted in the case for the attorney who had represented them at the hearing. This notice of substitution was signed by both

of said attorneys. Thereafter there was received from the respondents a motion to reopen the case for the reception of additional testimony to be taken by depositions at Los Angeles, California. This motion was denied. There was also received later a motion by the respondents that "all possible scientific tests be made and obtained by the Post Office Department" to determine the efficacy of the tablets sold by the respondents for the elimination or prevention of hunger when used in connection with the reducing plan. This motion was likewise denied.

Full consideration has been given to the original and supplemental briefs filed by the respondents, and to the legal authorities cited therein. The contentions made therein are without merit when considered in the light of the evidence in this case showing the falsity of the representations made through the mails by the respondents.

The evidence in this case clearly shows and I so find that the respondents operating under the names set forth in the caption hereof, are conducting a fraudulent enterprise through the mails as charged.

I, therefore, recommend that a fraud order be issued against all of the names set forth in the caption of the memorandum of charges, at Los Angeles, California.

(Signed) VINCENT M. MILES

Solicitor.

[Copy]

Order No. 29990
(Case No. 44237-F)

POST OFFICE DEPARTMENT

WASHINGTON, December 10, 1945.

To the Postmaster,
Los Angeles, California.

It having been made to appear to the Postmaster General, upon evidence satisfactory to him that Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System, and their officers and agents as such, at Los Angeles, California, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the memorandum of the Solicitor for the Post Office Department of the date of December 6, 1945, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said party & concerns and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said party & concerns to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) J. M. DONALDSON
Acting Postmaster General.

POSTAL FRAUD ORDER LAWS

Title 39, U. S. Code 259 provides:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or com-

pany, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself." (39 U. S. Code 259.)

Title 39, U. S. Code 732 provides:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or prop-

erty of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

“This shall not authorize any person to open any letter not addressed to himself.

“The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way.” (39 U. S. Code 732.)

No. 11,998

IN THE

United States Court of Appeals
For the Ninth Circuit

MICHAEL J. FANNING, individually and as
Postmaster of the City of Los Angeles,
California,

Appellant,

vs.

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC. (a cor-
poration),

Appellees.

Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR APPELLEES.

CHARLES H. ROWAN,

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229 East Wisconsin Avenue, Milwaukee, Wisconsin,

Attorneys for Appellees.

FILED

NOV 28 1948

PAUL P. O'BRIEN,

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IN THE

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MICHAEL J. FANNING, individually and as
Postmaster of the City of Los Angeles,
California,

Appellant,

vs.

AL WILLIAMS and AL WILLIAMS HEALTH
SYSTEM OF LOS ANGELES, INC. (a cor-
poration),

Appellees.

Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The appellee, Al Williams, has had years of experience in the field of physical conditioning. He boxed and wrestled professionally from 1906 to 1916, when he became an instructor of the wrestling team at the Olympic Club in San Francisco. (Tr. p. 158.) During the period of the First World War he instructed soldiers, at the request of the War College, in a system of rifle disarming for self-defense purposes which he had originated. When the war ended,

he resigned to go into the work of conditioning business and professional men. (Tr. p. 158.) He opened his first establishment in San Francisco in 1920, and then one in Oakland, one in Pasadena, and three in Los Angeles, and during the depression years up to and including the present day, has been located in one establishment in Los Angeles. At one time his organization numbered about 250 employees, who conditioned over 50,000 business and professional men. (Tr. p. 159.)

Al Williams studied weight reduction from the time he became a professional athlete and has had much actual experience in the conditioning of boxers and wrestlers. (Tr. p. 160.) By this experience he learned how to decrease the weight and increase the energy by the use of selective foods and nutrition. He first became interested in concentrated nutrition in 1935, when he began experimenting with concentrated food formulas and their effect upon his own body as well as upon many others. Since that time he has revised the food schedules of at least 50,000 individuals and has applied the experience gained by such experimentation in the perfection of what is known as the "Al Williams Weight Reducing Plan". (Tr. pp. 160, 161, 165, 166, 167.)

The "Williams Plan" consists of prescribed diets (Tr. pp. 81, 82), exercise (Tr. p. 83), internal baths (Tr. pp. 211, 212), the taking with fruit juice, milk, soup or water, of certain vegetable concentrates, for the purpose of taking away hunger and the desire to overeat (Tr. p. 191), and the use of a Special Body

Massage Creme to tighten the skin and hold correct flabby, fat tissue caused by the loss of weight. (Tr. pp. 176, 177.)

On the 25th day of May, 1945, the Post Office Department filed and mailed to the appellees a memorandum recommending the issuance of a show cause order against the appellees together with a letter in the form of an order to show cause, designating the memorandum as a "Specification of Charges" and informing the appellees that the charges would be taken up for disposition on the 20th of June, 1945. (Tr. pp. 10, 11.) Appellees filed an answer to the charges and attended the hearing with their counsel. On or about the 10th of August, 1945, the appellees filed a motion to reopen the case before the Post Office Department for the purpose of taking depositions of medical doctors in Los Angeles in refutation of the testimony of the government witness, Dr. Putnam, which motion was denied. (Tr. p. 228.) Thereafter the appellees filed another motion to reopen the case in order that "actual scientific tests might be made and obtained by the Post Office Department to determine the efficacy of the tablets sold by the respondents for the elimination or prevention of hunger", which motion was similarly denied.

On December 10, 1945, the Postmaster General made an order forbidding the payment of postal money orders to the appellees and directing the return of mail sent to them, marked "Fraudulent". (Tr. p. 228.)

On January 7, 1946, the appellees commenced an action against the Postmaster of the City of Los Angeles in the District Court for the Southern District of California to enjoin the enforcement of the Postal Fraud Order which had been entered against them. The injunction was denied on the ground that the Postmaster General was an indispensable party to such an action. In denying the injunction, the Court, however, expressed its opinion on the merits of the case in the manner following:

“In the instant case, except for the evidence of mailing and a chemical analysis of some food tablets—and the chemical analysis bore out the plaintiff’s representations—there was no evidence at all before the Postmaster General except the testimony of an employee of the Food and Drug Administration of the government, who testified as a medical expert as to the efficacy, in his opinion, of plaintiff’s plan of reducing obesity. Although the record shows that upwards of 50,000 persons had used plaintiff’s plan in whole or in part, which included not only dieting but exercises in some cases as well, not one of them, nor any other person, was produced to testify as to any matter at all. The plaintiff was excluded from testifying as to his actual experience with his plan on persons other than himself. And on a motion for reopening to permit medical testimony on behalf of the plaintiff, the motion was denied although the hearings were held in Washington, D. C., and the plaintiff had no notice of the plan of the Postmaster General to produce or rely on medical opinion evidence.

“The McAnnulty case is clearly authority for the proposition that the statute does not authorize the Postmaster General to be an arbiter of medical opinion and to use the terribly effective power of the denial of the mails based solely upon that opinion. In *Hannegan v. Esquire*, decided February 4th of this year, where the Supreme Court construed the second class mailing statute, they held there that the powers, although just as great under that statute in the Postmaster General as in the fraud statute, did not authorize him to be an arbiter of what was literature or what was art or what was moral.” (Tr. pp. 272, 273.)

The case was appealed to the Circuit Court of Appeals of the Ninth Circuit where the judgment was affirmed and to the United States Supreme Court where the judgment was reversed, and the case returned to the District Court for trial on its merits.

Following the reversal in the United States Supreme Court, the appellant filed an answer and appellee moved for summary judgment. The District Court granted this motion and entered a final judgment, dated May 6, 1948, permanently enjoining the appellant from enforcing the fraud order. The opinion of the Court rendered on the 27th of April, 1948 is as follows:

“Repeated examinations of the entire record of the proceedings before the Postmaster General confirms the contention of the plaintiff that the only evidence in such record to support the order is opinion evidence of one Putnam, who identified himself as a doctor employed full time by the

Food and Drug Administration, and who practiced medicine at night and odd times.

“Under the rule of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 and the numerous cases following it, among which are *Jarvis v. Shackelton*, 186 Fed. 2d 116, *Pinkus v. Walker*, 21 Fed. Supp. 610, and *Pinkus v. Walker*, 71 Fed. Supp. 993, mere opinion evidence is not substantial evidence to support such an order.

“The order of the Postmaster General is not supported by any substantial evidence and it was therefore beyond his lawful authority to issue and is void.” (Tr. p. 36, No. 11998.)

All references to the transcript refer to Transcript of Record No. 11317 in the earlier case of *Williams v. Fanning*, unless otherwise entitled, in which case the reference is to Transcript of Record No. 11998.

QUESTIONS INVOLVED.

(1) Whether the fraud order issued by the Postmaster General was unwarranted by the facts.

(2) Whether the fraud order issued by the Postmaster General was unsupported by substantial evidence.

(3) Whether the fraud order was supported only by theoretical, opinion evidence and therefore, properly set aside by the Court below.

(4) Whether the appellee was denied a fair hearing by the Postmaster General and the Postmaster

General's decision to issue a fraud order was not fairly arrived at.

ARGUMENT.

I. A POSTAL FRAUD ORDER WILL BE SET ASIDE WHERE IT IS UNWARRANTED BY THE FACTS.

In his brief appellant has presented a number of decisions on the question of what is the proper standard of review to be followed by a Court which is asked to enjoin the enforcement of a fraud order.

As stated in *United States v. Harrison*, 200 F. 662, 666, many authorities in postal fraud order cases "seem rather extreme." This is perhaps because the fraud orders in those cases were felt to affect the undeserving. However, the tone of the more recent decisions indicates a feeling that the earlier authorities went too far in their zeal to strike down patently fraudulent enterprises.

"Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare."

Pike v. Walker, 121 F. (2d) 37.

"But mail service is not a special privilege. It is a highway over which all business must travel."

Esquire v. Walker, 151 F. (2d) 49.

We wish to suggest that the proper standard for review may be found in the Administrative Procedure Act, U.S.C.A. Title 5, Section 1009, and that it is that a fraud order will be set aside if it is unwarranted by the facts. Section 1009 provides, in part, as follows:

“Judicial review of agency action. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * * So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (b) hold unlawful and set aside agency action, findings and conclusions found to be * * * (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of and agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.”

It is our understanding that the Post Office Department feels that it is not subject to Sections 1006 and 1007 and therefore is not complying with them, because the fraud order statute does not specifically require the holding of hearings. (U. S. Code, Title 39, Section 259.) If this is correct, subsection (5) of 1009 is not applicable, and subsection (6) is applicable.

This suit being an equity action permits a trial *de novo*.

It is appellee's position that the issuance of the fraud order against him was without warrant of the facts and without the support of substantial evidence.

II. A POSTAL FRAUD ORDER WILL BE SET ASIDE IF PURPORTED ONLY BY OPINION EVIDENCE, UNDER THE RULING MADE IN *AMERICAN SCHOOL OF MAGNETIC HEALING v. McANNULTY*, 187 U.S. 94.

The failure of the Postmaster General to make a determination based on factual evidence deprives the Postmaster of jurisdiction to issue a fraud order. It is true, of course, that the Postmaster has jurisdiction of the subject matter, i.e., the mails, but in order to keep that subject matter from travelling its designated route, by virtue of a fraud order, he must keep his action within the purview of the statute granting him that power, that is to say, he must find as a fact that a scheme or device for obtaining money or property is being conducted by means of false and fraudulent pretenses.

U.S.C.A., Title 39, Section 259.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. ed. 90, is one of the leading cases on the subject of postal fraud orders and one which specifically considers the question of the type of evidence on which a fraud order must be based to be valid. In that case the complainants had founded a business upon the proposition

that the mind of the human race is largely responsible for its ills and taught and practiced healing through exercise of the faculty of the brain and mind. The Postmaster had found "evidence satisfactory to him" of fraud, in the opinions of certain doctors who testified for the Government. The Court in setting aside the fraud order said:

"Can such a business be properly pronounced a fraud within the statutes of the United States?

"Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them toward the accomplishment of a cure of the disease under which he might be suffering, who can say that it is a fraud and false pretense or promise within the meaning of the statutes?

"How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in * * * opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not

assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court * * *

“* * * As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method of cure is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud.

“Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be involved for the purpose of stopping the delivery of mail matter * * *

“* * * Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.”

The McAnnulty decision has been quoted or cited with approval by the United States Courts approximately one hundred times and as recently as June 4, 1947, *Pinkus v. Reilly*, 71 Fed. Supp. 993. It was cited by the U. S. Supreme Court as recently as February 4, 1946, *Estep v. United States*, 327 U. S. 114. In *Independent Packing Co. v. Houston*, 242 F. 337,

the Court said of the McAnnulty decision: "That whole case is worthy of consideration." In *Moxie Nerve Food Co. v. Holland*, 141 F. 202, the Court said:

"Proof that testimonials as to particular cures were fictitious would, of course, amount to proof of fraudulent representation of fact, and would be sufficient to debar the complainant from relief; but to say a person who took medicine was cured or benefited thereby seems to be regarded as more in the nature of an expression of an opinion than of a representation of fact." (Citing the *McAnnulty* case.)

In *Pinkus v. Reilly*, 71 F. Supp. 993, which involved a reducing plan, the Court held:

"The findings as to the effectiveness of the plan, the severity of the diet, and the inherent values of kelp as employed in the kelpidine plan, are not such matters, in the Court's opinion as are subject of proof as an ordinary fact. The rigors of the plan and the claims of its effectiveness as a weight reducing method may be hotly contested, but there remains no exact standard of absolute truth by which to prove the assertions false and a fraud.

"Such a determination seems to me to place this case peculiarly within the ruling of *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, when the court in that case held that: '* * * these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.' "

Other cases citing the *McAnnulty* rule with approval are:

- National Life Insurance Co. of America v. National Life Insurance Co.*, 209 U.S. 317;
Peoples United States Bank v. Gilson (DCED Mo.), 161 Fed. 286;
Missouri Drug Co. v. Wyman, 129 Fed. 623;
Public Clearing House v. Coyne, 194 U.S. 496;
Bates & Guild Co. v. Payne, 194 U.S. 106;
Noble v. Union River Logging Co., 147 U.S. 171;
Wis. Central R. R. Co. v. Forsythe, 169 U.S. 46;
Rosenberger v. Harris, 136 Fed. 1001;
Harris v. Rosenberger, 146 Fed. 449;
Jarvis v. Shackleton Inhaler Co., 136 Fed. (2d) 116;
Wallace v. Adams, 143 Fed. 715;
James v. Germainer Iron Co., 107 Fed. 397;
Hurley v. Dolan (DC Mass.), 297 Fed. 825;
Harrison v. U.S., 200 Fed. 665, 666.

The rationale of the *McAnnulty* case is that medical opinion is too variable a criterion, too inexact a yardstick by which to measure truth or falsity, in a proceeding involving so severe a civil penalty. It is common knowledge that there are tides of medical opinion akin to fluctuations in other intellectual fashions. Moreover, it has often been observed that experienced practitioners have widely divergent views as to the course of treatment to be used in the treatment of specific disease. The pendulum of medical opinion hav-

ing reached the top of its arc frequently descends in quite the opposite direction.

It was ably stated in *Stunz v. United States*, 27 F. (2d) 575:

“Medicine is not an exact science. A respectable amount of authority can be cited to dissipate the value of any recognized method of treating disease. * * * The so-called quack remedies of today may be held tomorrow as an absolute cure and vice-versa. Vaccination, for instance, is believed by a large majority of the medical profession to prevent small-pox. Others with equally sincere opinion advocate the contrary view.

“When the white man and the Indian hunted together and the meat divided up, the liver, discarded by the white man, was prized by the Indian for its medical properties. Today, it is prescribed by the medical profession as a certain cure for pernicious anemia. Not many years ago the so-called Chinese herb doctors were prosecuted under this identical statute for representing that portions of dried fish, especially the head, were a sure cure for heart trouble. It is now established that adrenalin which can be obtained from certain kinds of fish is a powerful heart stimulant.”

Concededly, the McAnnulty rule does not extend to expert testimony concerning scientific tests or experiments conducted by the witness to determine the efficacy of the product.

“Testimony of experts that is based upon tests or experiments made by them does not come

within the ambit of the McAnnulty rule." *Research Laboratories v. United States*, 167 F. (2d) 410, 415. See also *United States v. 7 Jugs of Dr. Salsbury's Rakos*, 53 F. Supp. 746; and *Elliott Works v. Frisk*, 58 F. (2d) 820.

Quite naturally, where it can be conclusively demonstrated by tests that the representations made are false, testimony of such tests is credited as being factual rather than opinion.

"Qualified members of appellee's profession testified that his representations could not be and had not been fulfilled." *Farley v. Heininger*, 105 F. (2d) 79.

However, these cases have no application here where no scientific tests or experiments were conducted to determine the efficacy of appellee's plan, and the opinions of the witness, Dr. Putnam, were unsupported by any factual demonstration.

Similarly, the McAnnulty rule has not been applied in cases in which the product was extravagantly advertised as a panacea for all ills and the evidence indicated that the product had very little therapeutic value (*Leach v. Carlile*, 258 U.S. 138) or was completely worthless. (*Neher v. Harwood*, 128 F. (2d) 846; *Kar-Ru Chemical Co. v. United States*, 264 F. 921.)

In *Leach v. Carlile*, supra, Organo Tablets were advertised as "recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline or

weakened manhood and urinary disorders * * * sleeplessness and run down system and other disorders." The advertising indicated that the tablets were a "panacea" for every illness known to man. There was in the record considerable testimony that the remedy was absolutely without value, although some witnesses credited it with having slight value. The Court also observed:

"Appellant is an old offender, a prior fraud order having been issued against him under another name in April, 1918, as a result of which he changed his trade-name and modified in a measure his advertising matter."

None of the elements which brought *Leach v. Car-lile* outside of the McAnnulty rule are present in this case. Here, the product was not offered as a panacea for all ills, but as a means of reducing excess weight. Incidentally, panacea is defined in *Webster's International Dictionary of the English Language*, as:

"A remedy for all diseases; a universal medicine; a cure-all * * *"

Here, the product sold was not worthless or of a slight value, but was admittedly efficacious to reduce the weight of everyone who tried it. And here there is no intimation that appellee is an old offender, a knowing and habitual violator of the postal laws. His record is clean, having had no difficulties with the Post Office Department before this one.

The McAnnulty rule has not been applied to cases involving lotteries, for the reason that opinion testi-

mony has not played a significant role in hearings on such cases. In these cases the facts have been largely admitted and the Court has centered its discussion around the question of whether the Postmaster was incorrect in determining that the particular plan involved was a scheme designed to defraud persons, and, thus, the Courts have not had occasion to consider the question of the *type* of testimony on which the Postmaster may base his fraud order. It is from these cases that such expressions as "the exercise of this jurisdiction by the Postmaster General is due process of law and his decision will not be disturbed, unless he has exceeded his authority or his action is palpably wrong" (*New v. Trebond Sales Corporation*, 19 F. (2d) 671) and "his action will not be reviewed by the Court in doubtful cases" (*National Conference on Legalizing Lotteries, Inc. v. Farley*, 96 F. (2d) 861) come. Since opinion testimony of experts was not involved in these cases, the expressions taken from them should not be construed as limiting the evidentiary requirements of the *McAnnulty* case.

There are some indications in the record that there is a difference of opinion on the medical issues involved in this case. The affidavits of Dr. Charles J. Pflueger and Dr. M. John Beistel directly controvert the opinions of Dr. Putnam. (Tr. pp. 261, 262, 263, 164.) Then there was testimony by the appellee, who, although a layman, is widely experienced in weight reduction work, to the effect that the massage cream is an astringent (Tr. p. 176), that the tablets satisfy hunger (Tr. pp. 191, 205) and give more energy (Tr.

pp. 192, 204), and help keep a person physically fit. (Tr. p. 206.)

In the instant case the only evidence of lack of merit in complainant's preparation was that of Dr. Lawrence E. Putnam. He was the only witness who testified for the Government on the question of the merits of the preparation. Dr. Putnam had never prescribed the product for anyone and had never examined or observed anyone who had used the complainant's preparation. Just as in *Pinkus v. Reilly*, supra, the merits of the complainant's reducing plan are a matter of opinion and, "question of whether the methods of treatment for obesity as suggested by the plaintiff's reducing plan, are in fact without benefits, or are so far from producing results claimed by the method or treatment advocated as to amount to a fraud on the users thereof, was not the kind of question intended to be submitted for decision to the Postmaster General".

The Postmaster General has been repeatedly restrained by the Courts from giving the force and effect of law to his personal opinions on matters concerning which ideas change with the times and opinions pro or con are unsupportable by conclusive facts.

For that reason the Courts held in the cases of *Esquire v. Walker*, 151 F. (2d) 49, and in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (February 4, 1946) that even though the Postmaster General had five clergymen (among whom was a Bishop) to support his decision, since their testimony was opinionate, the evi-

dence was insubstantial and did not support the postal fraud order. Said the Circuit Court: "Once we admit the power claimed here we see no room for the effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation." Said the Supreme Court in affirming: "But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system * * *". Certainly, it is likewise not the prerogative of the Postmaster General to set the standards of medical practice in controversial matters, and to determine what are the proper remedies for the treatment of obesity.

III. THE FRAUD ORDER ISSUED HEREIN WAS NOT BASED ON SCIENTIFIC FACT BUT WAS BASED ON OPINION TESTIMONY OF SUCH A VAGUE, INACCURATE, UNRELIABLE CHARACTER THAT IT IS NOT ENTITLED TO BELIEF AND SHOULD NOT BE CREDITED AS SUBSTANTIAL.

Substantial evidence is evidence which is not vague or uncertain but which is factual, definite, and convincing.

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such a character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of

proof which induces conviction and makes a lasting impression on reason." *Carlay Company v. Federal Trade Commission*, 153 F. (2d) 493, 496.

In the present case there were four witnesses for the government, Post Office Inspector John W. Davis, who identified certain pieces of the appellee's advertising matter, Frank W. Casey and William V. Eisenberg, chemists, who gave analyses of the appellee's tablets and massage cream, and Lawrence E. Putnam, M.D., who gave opinions of the efficacy of appellee's reducing plan. The opinions of this last witness were in many instances so weak and inaccurate as to raise the suspicion that they were mere guesses.

His qualifications were not impressive. He had graduated from a medical school in 1934, interned at several hospitals until 1938, was with the Veterans' Administration and Civilian Conservation Corps until 1942, and since then he has been employed by the Food and Drug Administration in the capacity of a label reader. (Tr. p. 103.) In his early years he did not practice for periods of more than three months at any one time, and since coming to Washington he has engaged in private practice only at night and on week-ends. (Tr. p. 105.)

At no place in his testimony did this witness contend that appellee's reducing plan would not reduce obese persons to the degree represented, nor did he question that the persons whose testimonial letters appear in appellee's advertising matter actually sustained the weight loss reported.

He was asked how he would treat obesity (Tr. p. 108), and thereupon he proceeded to tell about his system of treatment. (Tr. pp. 108-120.) Certainly the fact that a witness uses a certain method of treatment is not substantial evidence that other methods of treatment are worthless, undesirable, or fraudulent.

Before appellee sells his plan to a person, he requires such person to fill out an analysis chart (Exhibit 5C-3) and give information on the following subjects: (1) Height; (2) Weight; (3) Greatest and lowest weight in the last ten years; (4) Age; (5) Waist measurement; (6) Hip and bust measurements! (7) Nationality; (8) Occupation; (9) Can you exercise; (10) Use of tobacco; (11) Use of liquor; (12) Use of soft drinks; (13) Use of laxatives; (14) Is elimination good; and (15) Any operations. (Tr. p. 74.) The witness criticized this information as inadequate (Tr. p. 115) but admitted that the information he would ask a patient for is his age, sex, occupation, previous history of disease, family situation, and income. (Tr. p. 109.)

The witness was allowed to testify that he thought a physical examination should precede weight reduction (Tr. p. 112) despite the fact that a great many people the world over manage the problem of weight control themselves without ever seeing a doctor.

When the witness got to the matter of analyzing and commenting on appellee's reducing diet, he became guilty of some very glaring inaccuracies.

"Q. You will recall perhaps that I handed to you for ready reference Exhibit 4-D-1, which is

the diet plan sold by respondents, and you will note that there are two phases of the diet, one prescribing two meals a day at the outset and then you go on a three meal a day diet. Can you tell us or will you tell us the average number of calories provided daily under these plans?

A. In the two meal a day food plan the average number of calories in the breakfast is about 250, the average number of calories in the dinner is 350, a total of about 600 calories daily. This does not include the days number 4 and 8 when the tablets are taken with fruit or vegetable juice or soup. On these days the caloric intake would be very low, somewhere between 75 and 150 or more calories.

Q. You mean for the whole day, Doctor?

A. For the day. On the three meal a day reducing food plan the average number of calories taken at breakfast would be 150 calories and the average for each of the other two meals, luncheon and dinner, would be about 350 calories, making a total of about 750 calories daily except on those days when the tablets are taken with fruit or vegetable juice and no meals are eaten. Those are days number 3, 6 and so on.

Q. Going back to the first part of this program, the days when the patient takes nothing but the tablets and the accompanying liquids, how many calories on an average would he consume on the whole day?

A. I am sorry I may have made a mis-statement. I believe I said 75 to 150 or more calories. That would apply to each glass of fruit or vegetable juice or soup and if that were taken several times a day the number 75 to 150, or roughly a

hundred, would have to be multiplied by the number of glasses of juice or soup that were taken.

* * * * *

Q. There is a statement on the attached page that one should not take more than 10 tablets a day and on the tablet days on the diets it is indicated that one should take two or three tablets every three or four hours. Assuming he took two each time that would mean that five times during the day he took these tablets accompanied by some liquid. So that would total, Doctor, how many calories on an average for the day?

A. Well, if you consider that the average juice or soup would be about 100 calories and if that were taken five times a day that would be about 500 calories per day." (Tr. pp. 121, 122, 123.)

The exhibit to which counsel for the Post Office Department and the witness were referring contains the only directions for taking the tablets set forth in the record. These directions provide as follows:

"Take 1 tablet before breakfast, 2 at noon, and 2 tablets before dinner. Anytime during the day when you feel hungry take 1 or 2 tablets (not to exceed 10 tablets).

"Don't chew the tablets, swallow them with 1/2 glass of fruit juice, skim milk, or if it is a cold day take with hot soup or broth. If at work and you cannot have the fruit juice, take them with water.

"The day that you are exclusively on the Food Tablets, take 2 or 3 tablets during the day when hungry. Take tablets with water, fruit juice, soup or skim or buttermilk. When following a 2 meal day food plan go every 4th day taking only the

Food Tablets. When following a 3 meal day food plan, go every 3rd day taking only the concentrated Food Tablets."

From the above several errors readily become apparent.

1. On simple arithmetic the average caloric intake for the three meal day should be 850 calories and not 750 as stated by the witness.

2. The purchaser is directed during both the two and three meal day to take up to ten tablets with accompanying juice, broth or milk. These are to be taken one or two at a time with liquid whenever the person feels hungry. If these ten tablets are taken two at a time in the manner suggested by counsel, this would add 500 calories to the daily intake, making an average of not 600 but 1100 for the two meal day and not 850 but 1350 for the three meal day. Since the witness said the accompanying liquid would provide from 75 to 150 "or more" calories, the daily intake under each plan might be even greater. Also since the tablets may be taken one at a time, instead of two at a time, except at luncheon and dinner, this could add an additional 300 calories to the daily intake, making the average intake for the three meal day 1650 calories and for the two meal day 1400 calories. This is all premised on what we feel to be the fair assumption that, since these diets are very flexible and their purpose is stated to be to keep the user from becoming hungry needlessly, users will so use the plan and take the tablets in such a manner as to afford them the greatest possible degree of comfort.

3. Although the directions state a ten tablet limit for two and three meal days, they state no such limitation for the days on which just tablets and liquids are to be taken. The user is directed to take tablets and liquids "when hungry". Thus the caloric intake for the meal-less day would be 100 calories multiplied by the number of times the user of the plan became hungry.

Thus when in reply to the question how great a caloric reduction the plan would make in the diet of average obese person the witness said from 3500 or 4000 down to 600 (Tr. p. 124), his answer was based on a misconception of the plan and what it provides. When he stated immediately thereafter that such a diet would not be an easy diet for an obese person to follow (Tr. p. 124) he was obviously thinking of a 600 calory diet and not of the caloric intake provided by the appellee's plan. Similarly we think that when this witness testified about the safeness and strictness of the plan, he was under a misapprehension as to what the plan really provides.

But not only was the witness at sea as to the details of the diet plan, he obviously knew little about the ingredients contained in the tablets and massage cream. The formulas of the tablets and cream were not submitted to him, but he stated that he had been present when earlier witnesses had given the analyses. (Tr. pp. 127, 132.) He did not state, however, that he was familiar with the nature, or character, or properties, or therapeutic or nutritional values of the various ingredients of these preparations, nor that

he had ever used any of them in his practice, or observed their use by others, or personally made or witnessed any scientific tests to determine their efficacy for the purposes for which they are used in appellee's preparation. The record is silent on these things, and it can safely be assumed that the witness did not have much knowledge of these ingredients or diligent counsel for the Post Office would have had him disclose it. Indeed, the witness said, "I do not use drugs in the treatment of obesity." (Tr. p. 141.)

On the issue of safety the witness, still under a misapprehension as to what the plan provides, said:

"A. Well it is conceivable that a patient may have had tuberculosis. The patient may have been made overweight purposely by a physician. The purpose of making a patient overweight is to keep him on the good side of health. If he loses weight he may expose himself to a reactivation of the tuberculosis * * *" (Tr. p. 110.)

We submit that a person who knows he has tuberculosis and had been under treatment for it by a doctor is very unlikely to undertake a reducing program.

The witness also said reducing might be harmful in diabetes. This was the only other condition specified by him in which reducing is contra-indicated. Here, too, the patient usually knows he has diabetes, is under medical supervision, is on a rigid diet, and is not apt to undertake a different diet without his doctor's advice.

We think the following two answers by the witness on the issue of safety are interesting:

“A. Well, I know for a fact that many people never consult a physician and do reduce and are not harmed by it. That’s why I say it may not be safe rather than it is not safe.” (Tr. p. 145.)

“A. I don’t know of anybody that has bought that plan (appellee’s) but so far as I know they might have reduced safely.” (Tr. p. 145.)

Concerning hunger pains the witness testified:

“Q. You have indicated that there is a possibility or I believe you have, that if one takes these tablets with fruit juice or buttermilk or the others the hunger pains might disappear.

A. Yes, they may.

Q. Is that a temporary effect or is that a lasting effect?

A. Of course it is temporary.” (Tr. p. 155.)

To establish that this witness’s testimony was mere opinion as distinguished from scientific fact, we have this statement:

“To determine whether or not the hunger pains were eliminated, if they were, by the tablets one would have to set up a control experiment and a scientifically controlled experiment can be done in any laboratory by the use of a kymograph that I mentioned and the balloon in the stomach and so on. One could really find out the effect of the various things that are put into the stomach on hunger contractions that way.” (Tr. p. 154.)

Yet neither the Post Office Department nor the witness who had laboratory facilities at the Food and Drug Administration were enough interested in really finding out the effect of the tablets in the stomach, to

have a test made. Instead they chose to rely on mere opinion or guesswork. Certainly this hardly indicates that the Post Office Department availed itself of "the unlimited professional resources" of the Food and Drug Administration.

In view of this state of the record can the trial Court be criticized for finding no substantial evidence in the record to support the fraud order? No other finding could have been made in view of the lack of qualifications of the only medical witness, the unstable character of his testimony, his misapprehension as to what appellee's plan provided, his complete lack of experience with the subject matter involved, and his failure to make scientific tests which might have produced facts on which an administrative officer or Court could rely. When the trial judge in his Memorandum (Tr. p. 36—No. 11998) refers to

"* * * the opinion evidence of one Putnam, who identified himself as a doctor employed full time by the Food and Drug Administration and who practiced medicine at night and odd times",

he was making it crystal clear that he not only felt the witness to be unqualified but also felt his testimony to be worthless, without weight and unsubstantial.

This case is analogous to that of *Jarvis v. Shackleton Inhaler Co.*, 136 F. (2d) 116, wherein, as here, the only testimony adduced before the Post Master General was that of a Post Office Inspector, a chemist, and a doctor employed by the Food and Drug Administration, who testified from theoretical knowl-

edge as to the symptoms, causes and treatment of certain diseases of the upper respiratory tract, and the probable effect of the use of the inhalant upon those diseases for which it was recommended. The District Court enjoined enforcement of the fraud order on the ground that there was no substantial evidence to support it, and this decision was affirmed on appeal by the Circuit Court of Appeals (6th Cir.).

The Court in that case declared:

“That it did reach many (cases of respiratory trouble) is undisputed from the testimonials. There was no challenge to the truth of the testimonials except the testimony of a physician, reasoning from a theoretical and incomplete knowledge of the compound, that doctors would have used greater quantities of the drugs, and would never have employed the compound as the sole method of treatment.” (p. 119.)

In the present case there is also no challenge to the truth of the testimonials. The only medical testimony here is also the theoretical testimony of a Food and Drug Administration doctor based on an erroneous understanding of the reducing plan under consideration.

The appellant in his brief has cited a number of cases as holding that opinion testimony of the type presented here may be accepted as substantial. These are for the most part decisions in Federal Trade Commission and Food and Drug Administration cases in which the records are lengthy and contain the testimony of many reputable, disinterested medical wit-

nesses. None of them except perhaps *Cable v. Walker*, 152 F. (2d) 23, involve the flimsy, weak record presented in this case, and we except *Cable v. Walker* only because the decision fails to show the nature and extent of the testimony in that case. That decision referred to "considerable testimony" "by expert government witnesses" and there is no indication that such testimony was subject to the same objections as the testimony in the case at bar.

In *Fulton v. Federal Trade Commission*, 130 F. (2d) 85 there was involved a worthless remedy for an incurable disease, diabetes, and the witnesses for the Commission were shown to possess wide knowledge in the field under inquiry. In the present case we have a concededly efficacious treatment for obesity and a single witness possessing very little, if any, knowledge of the field under inquiry.

In *Dr. W. B. Caldwell Inc. v. Federal Trade Commission*, 111 F. (2d) 889, ten qualified physicians testified for the Commission. In *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. (2d) 676, two medical experts, one a leading dermatologist, testified for the Commission. In *United States v. One Device*, 160 F. (2d) 194, the government presented the testimony of five medical experts fully familiar with principles on which colonic irrigators work. In *Alberty v. Federal Trade Commission*, 118 F. (2d) 669, the Commission's order was supported by the testimony of doctors, established to be experts, of both the allopathic and homeopathic schools. In *Neff v. Federal Trade Commission*, 117 F.

(2d) 495, six doctors testified for the Commission that they were well acquainted with the ingredients (quinine, Epsom salts, etc.) of the preparation in question, had used them many times in their practice, and that such ingredients would not be helpful for prostatitis. In *United States v. 50 3/4 Dozen Bottles of Sulfa-Seb*, 54 F. Supp. 759, the medical experts who testified for the government were of outstanding qualifications.

In *United States v. 7 Jugs of Dr. Salsbury's Rakos*, 53 F. Supp. 746, the Court pointed out:

“Scientific witnesses for the Government in this case made elaborate and comprehensive tests of claimant's remedies under conditions most favorable to the remedies. * * * The report of such tests showed conclusively that the remedies were absolutely worthless.”

In *Justin Haynes and Co. v. Federal Trade Commission*, 105 F. (2d) 988, there was testimony by three well qualified expert witnesses called by the Commission, and “after extensive hearings an order was entered.”

In *Elliott Works v. Frisk*, 58 F. (2d) 820, there was involved a product called Nu Life which was advertised as a means of recharging batteries. The United States Bureau of Standards conducted tests in which they placed the preparation in all but one cell of each of a number of batteries and then later tested all cells for comparison purposes, with instruments which showed electrical energy increase, capacity, specific gravity, etc. The experts from the Bureau of Standards testified that no difference was found be-

tween the cells containing Nu Life and those which did not contain it.

When on page 27 of his brief the appellant says that "scientific investigations and tests" had been made of the tablets and massage cream by the Food and Drug Administration, he is not talking about the same thing that the Court in the *Frisk* case is when it refers to such tests and investigations. In the *Frisk* case and the other cases which refer to tests what is meant are tests to determine the value and efficacy of the preparation for the purpose for which it is offered. No such tests were made in the present case. The only tests made in this case were analyses which shed no light on the real issues involved in this case, especially since they merely bear out the accuracy of the list of ingredients contained on the labels. (Tr. pp. 94, 96.)

In *Goodwin v. United States*, 2 F. (2d) 200 the Court held that a medical expert must have knowledge of the drug elements and their efficacy or lack of efficacy as curative agents. This is a type of knowledge not possessed by the medical witness in this case.

In *Research Laboratories v. United States*, 167 F. (2d) 410, the evidence included "controlled clinical studies" conducted by two eminent, disinterested physicians. These tests consisted of the giving of the product in question to a substantial number of patients over a period of a number of months.

All of these cases are a far cry from what was done in this case. We earnestly submit that it would be a

most unfortunate precedent for this Court to permit an administrative officer, possessing the power to completely destroy a business and brand its owner as a fraud even among his social correspondents and the people he does business with locally, to exercise that drastic power on the basis of a record so barren of facts as this one is.

There is another element which we hesitate to inject because of our high respect for the men who comprise the Food and Drug Administration. However, a doctor who works full time in the Food and Drug Administration reading labels and trying to find something wrong with them, not only becomes far removed from the realm of practical medicine but also may acquire a prosecutor complex. It is difficult for a doctor in that situation to remain completely unbiased and disinterested.

The record in this case is silent on the question of whether Dr. Putnam participated in the preparation of this case, but it is abundantly clear that the past seven years he has spent censoring labels. (Tr. p. 103.) There are also indications in the record that this case was at the Food and Drug Administration first before being acted upon by the Post Office Department. (Tr. p. 58.)

We contend that a fraud order should never be based on uncorroborated opinion testimony, particularly not on the uncorroborated opinion of a single doctor who is engaged primarily in the examination and criticism of labels for the Food and Drug Administration. Not only is there always present the ques-

tion of interest and bias on the part of such a witness but also there is the question of whether such a witness possesses sufficient practical medical experience to express a completely reliable opinion.

Requiring corroboration by way of scientific tests and the testimony of disinterested, practicing doctors is not a road block to protection of the public welfare. Corroboration of this kind should not be difficult to procure in cases of actual fraud. Respondents in these proceedings are entitled to certain rights. They are not to be presumed guilty merely by reason of service of an order to show cause on them. If the most severe civil penalty we know of is to be imposed on them, it should be imposed only on the basis of reliable, factual evidence.

Let us consider briefly the advertising claims used by appellee. He did not represent his plan as a cure-all panacea. Rather he says follow this plan and you will lose weight and feel better, and these claims are not challenged in this proceeding.

The appellee is charged with representing that his diet is not a strict diet. We fail to find this claim in his sales material. Also, nowhere in the record is a definition of what a strict diet is and Dr. Putnam said that both high and low diets may be strict. (Tr. p. 121.) Users of appellee's plan were given the choice of two meals a day or three meals, were allowed to take tablets and various types of liquid foods when hungry, and were allowed some choice in selecting their menu.

Terms such as “strict”, “easily”, “beautify”, “wonderful”, “amazing”, “perfect”, and “quickly” fall in the category of words which have been held to constitute justifiable puffing. In *Kidder Oil Company v. Federal Trade Commission*, 117 F. (2d) 892, 901 (7th Cir.) the Court held that the use of the words, “amazing” and “perfect”, as applied to a petroleum product, was not deceptive and said, “Such terms are largely a matter of personal opinion.”

In *Carlay Company v. Federal Trade Commission*, 153 F. (2d) 493, 496 (7th Cir.), the Court held that the terms “easy” and “simple” in describing a weight reducing plan, are comparative terms and constitute mere puffing. It further ruled:

“What was said was clearly justifiable, under the circumstances, under those cases recognizing that such words as ‘easy’, ‘perfect’, ‘amazing’, ‘prime’, ‘wonderful’, ‘excellent’, are regarded in law as mere puffing or dealers’ talk upon which no charge of misrepresentation can be based.”
Citing authorities.

In the *Carlay* case the weight reducing plan sold was somewhat similar to the appellee’s plan in that it consisted of a diet and candy which was consumed between meals to allay hunger and inhibit the appetite. The cease and desist order issued against the petitioner was set aside.

Another case involving a weight reducing plan, in which a fraud order was issued and enforcement of it was enjoined by the Federal District Court, is *Pinkus v. Walker*, 61 F. Supp. 610. The Court in that case

had this to say in criticism of the Post Office Department concerning itself with the safety of a reducing plan:

“If as a matter of fact, the course suggested by the complainant in his advertising is deleterious to health, it would appear that the remedy lies in other fields than those governed by postal regulations. Too frequently attempts are made to accomplish by indirection that which should be effected straightforwardly and directly. Surely the powers of government to protect the health and well being of its citizens can be better met by supervising agencies within the actual scope of medical control and by expert regulation, than by more or less arbitrary prohibition by the Post Office Department.”

Both the Federal Trade Commission and the Food and Drug Administration have medical departments. Perhaps it would be wise to reserve control of this aspect of reducing plans to those departments best qualified to exercise such control.

IV. THE APPELLEE WAS DENIED A FULL, FAIR AND IMPARTIAL HEARING, AND THE POSTMASTER GENERAL'S DECISION TO ISSUE A FRAUD ORDER WAS NOT FAIRLY ARRIVED AT.

The Post Office Department commenced its investigation of appellee by clipping his advertisements out of magazines around October 29th, 1944. (Tr. p. 58.) The Department spent seven months leisurely preparing its case and then on May 25, 1945, mailed an order

to show cause which appellee received on May 29, 1945, commanding him to make a defense to the charges in Washington, a city 3000 miles away, on June 20, 1945. (Tr. p. 46.) The Department took seven months to prepare its case and gave appellee only three weeks to prepare his.

America was at war. Automobile travel was impossible. Train accommodations to the Atlantic coast were very difficult to obtain. Getting to Washington in three weeks for the hearing was, in itself, a major accomplishment, without even considering the matter of preparing a defense.

The notice served on appellee gave meager information about what he was required to meet at the hearing. It set forth only the Department's interpretation of the meaning conveyed by appellee's advertising without indicating the portions of such advertising on which the charges were based and where and when such advertisements had been mailed. (Tr. pp. 220, 221.) Appellee's answer filed in this proceeding alleged that the charges were not definite enough to enable him to make a defense. (Tr. p. 52.)

The notice in no way indicated that only the testimony of physicians would be received on the issues involved in this case. The appellee and his counsel were unfamiliar with the procedure followed in these cases before the Department. Perhaps, if they had been given adequate time in which to prepare a defense, more thorough preparation might have disclosed to them the necessity for medical testimony.

Because of the war, doctors everywhere were extremely busy taking care not only of their own patients but also of patients of doctors who were in military service. Procuring a doctor on such short notice to leave his practice for a week and testify in this case would have proved impossible even if the appellee had attempted it.

Then to make the proceeding completely unfair the Solicitor's office on June 18th, only two days before the hearing, mailed to appellee an additional charge (Tr. p. 47) which he did not and could not have received before leaving for Washington. (Tr. p. 49.) This amendment to the charges was allowed by the hearing officer over appellee's objections. (Tr. p. 49.)

At the beginning of the hearing appellee's counsel asked for additional time in which to present his case, but this was denied by the hearing officer's ruling that he would not "try these hearings piecemeal." (Tr. p. 48.)

The Department called to the stand its medical witness, and it became apparent that although scientific tests could have been performed to determine some of the facts in issue they had not been performed. (Tr. p. 154.) The witness was allowed to give purely opinion testimony. The appellee was put on trial on the basis of the witness's ideas of how obesity ought to be treated. (Tr. p. 108.) The witness was even allowed to give his opinion of whether the writer of a testimonial letter might have been injured by the reduction of weight experienced even though he

had never seen or examined such person. (Tr. pp. 116, 119.)

Testimony by the appellee concerning the efficacy of his plan was excluded although he is a physical trainer of many years' experience and has reduced the weight of over 50,000 persons and his plan is non medical in character. (Tr. pp. 158, 160, 161, 164.) His testimony should have been received under all the circumstances of this case under the exception to the rule on expert witnesses "which permits a witness possessed of special training or experience to testify to his opinion when it will tend to aid the jury in reaching a correct conclusion." *U. S. Smelting Co. v. Perry*, 166 F. 407. Although the hearing officer would not permit appellee to testify on direct examination to any medical matters, he permitted counsel for the Department to cross-examine appellee at great length on such matters. (Tr. pp. 192 to 212, incl.)

In the conduct of his business appellee had received testimonial letters from several thousand satisfied customers. The hearing officer refused to receive these in evidence (Tr. pp. 167 to 171, incl.) although a dealer may in good faith upon receiving testimonials and relying thereon use them and the statements therein as the basis for representations and promises to customers and such testimonials are in such case admissible as evidence. *Goldstein v. United States*, 63 F. (2d) 610; *Dr. J. H. McLean Medicine Co. v. United States*, 253 F. 694, 697. These testimonials were conceded by counsel for the Department to be genuine (Tr. p. 170), and they contained statements

supporting those advertising claims charged by the Department to be fraudulent. (Tr. p. 174.) The appellee apparently relied on these letters in making advertising claims. (Tr. p. 167.)

Counsel for appellee thereupon informed the hearing officer that it would be probably impossible to obtain medical witnesses with the inadequate time remaining. (Tr. p. 164.) He and appellee were 3000 miles from home in a strange city where they knew no doctors. There was no possibility to subpoena a medical expert, because the postal statutes do not provide for such a procedure. As was stated in the Final Report of the Attorney General's Committee on Administrative Procedure, Senate Doc. 8, 77th Cong., 1st Ses., P. 154:

“The postal statutes make no provision for the issuance of subpoenas by the Department in the case of fraud order hearings. While this does not seriously hinder the Department in the presentation of its case because of the availability and willingness of its witnesses (postal inspectors and Government experts), the respondent may face serious difficulties in obtaining the presence of witnesses who must usually travel far and are often unwilling to testify ‘against the government’.”

The hearing concluded without the appellee presenting a medical witness. On August 10, 1945, and four months before the decision by the Postmaster General in this case, appellee retained new counsel who immediately filed with the Department a motion

for permission to take the depositions of Dr. Charles Pflueger and Dr. M. John Beistel on behalf of the appellee at Los Angeles. Later another motion was filed that all possible scientific tests be made to determine the efficacy of the tablets in the prevention of hunger. Both of these motions were denied. (Tr. pp. 227, 228, 261, 262, 263, 264.)

Although the postal statutes do not specifically provide for the taking of depositions, we know of no provision which prohibits the Postmaster General from receiving in evidence and considering such depositions. Refusal to receive depositions in this case imposed a heavy burden upon appellee, for medical testimony in his favor was procurable but could not be presented at Washington because of conditions caused by the war.

“The fraud order section has only one hearing officer, who hears approximately 100 cases annually. All hearings are held in Washington, D. C. In addition the Department has made no provision for a deposition procedure. The unavailability of depositions, when coupled with the holding of all hearings in Washington, D. C. imposes a heavy burden upon respondents whose places of business or whose witnesses are not close at hand.” Report of the Attorney General, *supra*, pp. 152, 153.

The Department denied the motion for the taking of scientific tests of the tablets, although they had granted such a request in *Farley v. Heininger*, 105 F. (2d) 79, 83, in which they assigned a post office inspector and a dentist to take an extended tour through

ten states and check with respondent dentures made by him to determine whether they fit the purchasers thereof.

Then on December 10, 1945, the Postmaster General issued a fraud order not only against Al Williams Health System, Al Williams, Health Conditioner, Al Williams, Physical Conditioner, and the Williams Health System but also against appellee's personal name, Al Williams, although it was apparent that he also received under that name social and personal correspondence and possibly mail concerning a local health establishment which he operates in Los Angeles.

In *Donaldson v. Read Magazine*, 68 S. Ct. 591 (March 8, 1948) the Supreme Court refused to reinstate a fraud order until the Postmaster General had deleted the name of an individual, Henry Walsh Lee, from the order and gave assurance that the designation contained in the order, "Judith Johnson, Contest Editor", would not be construed to bar delivery of mail addressed to "Judith Johnson", so as to free the fraud order of constitutional objections. The Supreme Court made it plain by its action that where a business is conducted principally under certain trade names a fraud order should not include a personal name which also happened to be used in connection with the business.

It is our feeling that a fraud order proceeding should not have been brought against appellee. He was selling an admittedly efficacious plan for reducing and was offering it solely for obesity. If the Government felt that some representations incidental to the

selling methods were misleading, the milder injunctive proceedings of the Federal Trade Commission would have been more appropriate. The Attorney General's Report, *supra*, expresses a very sound view of the purpose of fraud order procedure:

"The Federal Trade Commission strikes down only the fraudulent representations and other deceptive features of an enterprise through the issuance of a cease and desist order; the Post Office Department, on the other hand, has the power to destroy the entire business insofar as it is dependent upon the receipt of any mail (whether or not the mail is connected with the fraud)."

"The Committee recommends that further conferences between officials of the two agencies be held to map out a general program whereby the Commission will take jurisdiction over respondents whose business is in the main legitimate but some of whose representations are fraudulent, while the Department will prosecute cases involving respondents whose business is inherently fraudulent and the use of the mails is an integral part of the business." (pp. 154, 155.)

CONCLUSION.

There is no law which prohibits the sale of a weight reducing plan through the United States mails. The Al Williams plan will admittedly reduce the weight of purchasers of it so that it cannot be said to be inherently worthless or fraudulent. We do not agree with appellant when he says that weight reduction is necessarily painful and discouraging, and the record

does not bear out this contention nor that reducing by means of appellee's plan will be attended by great discomfort.

Appellant's own medical witness admitted that taking tablets with fruit juice, milk or broth will satisfy hunger, and appellant is in error when he contends that the plan at best provides only 750 calories per day. The plan provides for a caloric intake two or three times larger than this amount.

There was no reliable testimony on the hunger relieving qualities of the tablets, appellant's witness having no knowledge of or experience with the ingredients and the test which would have produced scientific data on this issue not having been made. Appellee's request that this test be made was denied by the Department. Concentrated nutrition by use of tablets of this type is a subject which the Department, possessing no medical facilities, is not in a position to know a great deal about, and the value of concentrated nutrition is certainly not a subject for the determination of the Postmaster General.

The affirmance of the fraud order is not required to enable the Postmaster General to continue to carry on his necessary activities in purging the mails of swindles, confidence games, and grossly fraudulent schemes. But the setting aside of this order is required to protect the rights of individuals who are cited to appear before the Department and assure them that they are entitled to a fair hearing and will not be branded as a fraud in the eyes of their family, friends, customers, and all the people they do business

with or receive correspondence from, except on substantial, convincing, reliable, factual evidence.

The judgment below should be affirmed and the appellant's appeal dismissed.

Dated, Milwaukee, Wisconsin,
November 22, 1948.

Respectfully submitted,
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Attorneys for Appellees.

No. 11998
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MICHAEL J. FANNING, Individually and as Postmaster of
the City of Los Angeles, California,

Appellant,

vs.

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF
LOS ANGELES, INC., a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN, 

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APPELLANT'S REPLY BRIEF.

I.

**The Administrative Procedure Act Does Not Change
the Well-Established Principles of Judicial Re-
view of Postal Fraud Orders.**

Under "I" of their brief, appellees attempt to brush aside the well-established rules governing judicial review of fraud orders issued by the Postmaster General set forth on pages 15 *et seq.* of Appellant's Opening Brief.

Appellees urge that the proper standard for review is to be found in Section 10 of the Administrative Procedure Act (5 U. S. C. A., Sec. 1009).

Primarily, the proceedings herein were instituted long before the passage or effective date of the Administrative Procedure Act (see Sec. 12, 5 U. S. C. A., Sec. 1011).

Second, nothing in Section 10(e) permits or contemplates any change from existing established principles of

judicial review. This section is merely declaratory of existing law concerning judicial review. See *Olin Industries Inc., v. National Labor Relations Board* (72 Fed. Sup. 225, 228 D., Mass., 1926).

The existing law as to judicial review of Post Office fraud proceedings has been carefully analyzed in Appellant's Opening Brief and the authorities therein cited clearly demonstrate that a trial *de novo* has never been allowed. The reviewing tribunal is confined to the record made before the department.

II.

This Action Should Be Dismissed Under the Doctrine of *Leach v. Carlile*, 258 U. S. 138 (1921).

Appellees' arguments in favor of affirmance are three-fold. First, it contends that the instant case is governed by *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902), rather than *Leach v. Carlile*, 258 U. S. 138 (1921). Second, the Post Office medical expert, Dr. Putnam, was not worthy of credence. Third, appellees were deprived of a fair and impartial hearing before the Postal Authorities.

Before considering these contentions, a clarification of the misrepresentations charged seems desirable. Appellees are not accused of having falsely stated that their plan would reduce weight, although in their brief they repeatedly seek to create that impression (App. Br. pp. 16, 34*). The accusation is that appellees have falsely represented, through the mails, that their "Plan" would result in loss of weight, *easily and safely without enduring the*

*Unless otherwise stated, "App. Br." is hereinafter used to designate the Brief for Appellees.

discomfort of hunger pangs, irrespective of age or condition of health.

This clarification eliminates the necessity of further discussing appellees' constant reiteration, expressly or by innuendo, that their "Plan" embracing "Foods That Take Hunger Away" is of conceded efficacy. Said "Plan" is not questioned as a weight reducer, but has been proven to be far from the panacea for the obese that its advertisements state.

(1) THE McANNULTY CASE DOES NOT APPLY HERE.

Referring to "II" of Appellees' Brief, an analysis of the *McAnnulty* decision, *supra*, shows that the defendant Postmaster, by demurring to the bill seeking injunctive relief against enforcement of a postal fraud order, conceded himself out of court by admitting the legality of plaintiff's business. Appellees are also guilty of misstatement in asserting that the Postmaster-General had found "evidence satisfactory to him of fraud in the opinion of certain doctors who testified for the Government" (App. Br. p. 10). There was no testimony whatever before the Postmaster General in that case, rendering it entirely inapplicable here where the evidence, as shown in Appellant's Opening Brief, is of a scientific factual nature.

In *Leach v. Carlile*, *supra*, the United States Supreme Court held that the manufacturer of certain tablets which he advertised extensively through the mails as "recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline or weakened manhood and urinary disorders . . . sleeplessness and run-down system, and various other ailments," had properly been denied injunctive relief against the postal fraud order.

In referring to the scope to be given the *McAnnulty* decision, the court said (pp. 139-140):

“Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public. This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary. *Bates & Guild Co. v. Payne*, 194 U. S. 106, 108, 109; *Smith v. Hitchcock*, 226 U. S. 53, 58; *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 484; *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 413, and cases cited.”

In the instant case, as clearly demonstrated on pages 19-21 of Appellant's Opening Brief, appellees have advertised through the mails a panacea for the obese; weight reduction without hunger or discomfort and increased energy irrespective of age, sex or condition of health. Also, as clearly demonstrated in such brief, appellees' "Plan" including their "Foods that take Hunger Away" falls far short of accomplishing that panacea.

Appellees seek to avoid the identity between the *Leach* and the instant cases by erroneously stating that in the *Leach* case, the “advertising indicated that the tablets were a ‘panacea’ for every illness known to man” (App. Br. p. 16). However, a reading of the advertising quoted above from that case clearly shows that no claim was made that the preparation was an unqualified cure-all. In fact, the “Plan” with “Foods that take Hunger Away” is as broadly advertised; being designated as a cure for dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure, and other symptoms due to surplus weight (Appellant’s Op. Br. p. 5).

Through appellees’ advertising, it is clearly asserted that “Foods that take Hunger Away” eliminate the discomfort resulting from dieting, thereby rendering adherence to appellees’ “Plan” easy [Tr. pp. 70, 71, 222-225]. The chemical and microanalyses of these “Food” tablets [Tr. pp. 91-102] show that each contains only two calories and weighs 7/10ths of a gram. Based on these analyses and his own personal knowledge of the tablets [Tr. p. 153], Dr. Putnam, the Post Office medical expert, stated that “Foods that take Hunger Away” would not prevent the followers of the “Plan” from suffering hunger [Tr. pp. 126, 127, 132, 133, 134 and 152].

Thus, appellees have advertised a panacea for the cure of obesity, a “Plan” for radical weight reduction without discomfort through the use of tablets which, under no conceivable circumstances, can possibly eliminate the ravages of hunger resulting from the dieting necessary to lose weight. The instant case is clearly embraced by *Leach v. Carlile*.

Appellees, in a further effort to escape the rule of *Leach v. Carlile*, state (App. Br. p. 17): “There are some in-

dications in the record that there is a difference of opinion on the medical issues involved in this case.”

Primarily, in the *Leach* decision, there was some conflict of evidence as to the therapeutic value of the tablets, as expressly stated in the court’s opinion.

Secondly, the so-called “difference of opinion” is premised on affidavits of a Dr. Charles J. Pflueger and Dr. M. John Beistel, as well as testimony of appellee Williams. These affidavits show they are nothing more than expressions of opinion [Tr. pp. 261-264]. They in no way indicate that the statements contained therein were based on any scientific tests or on any scientific measurements of caloric content or weight of the “Food” tablets. Finer expressions of what appellees term “opinion guesswork” could not be found.

Further, each affidavit states that it is impossible for the affiant to absent himself from the City of Los Angeles, California, and the Postal Authorities thus are deprived of any cross-examination. This factor alone renders the affidavits inadmissible for evidentiary purposes.

As to the testimony of appellee Williams, his own attorney conceded that “he is not testifying as a medical expert” [Tr. p. 162] and when it was suggested that Williams be examined and cross-examined as to his qualifications, his attorney conceded that he had nothing to offer [Tr. p. 166]. Under these circumstances, whatever Williams’ possible testimony, it could hardly be interpreted as creating divergence of evidence on any medical issues involved herein.

Further, Williams’ testimony demonstrates that conscientious adherence to the so-called “Plan,” including “Foods that take Hunger Away,” can create illness although the

advertisements sent through the mails in no way reveal that fact but deliberately state the contrary (Appellant's Op. Br. pp. 5-7). These advertised inducements to purchase the "Plan," "Food" tablets and massage "Creme" are replete with extravagant assertions that the user will "Feel Better, more Animated and More Vigorous."

However, in contrast to these enthusiastic representations, Williams, after testifying that reducing is very easy when the "Plan" is followed and that it worked with him, proceeded to state [Tr. p. 183] that he is 6 feet 1 inch but his weight runs between "220 and 340"; that he considered that to be a normal weight for a man of his size who is as active as he; and that if he reduced to 184 pounds, the normal weight for men of his height, he would "be sick at that weight * * *."

"A. Because of my physical make-up, the bone structure, the muscles developed from exercise and the general set up, I wouldn't be able to walk at that weight * * *." [Tr. pp. 183, 184.]

He further conceded that as to the people with whom he dealt through the mails he didn't know anything about their bone structure except from their heights [Tr. p. 185] and when asked why he should think that others wouldn't be made sick by following the "Plan" if it had that result with him, he testified, "Well, I don't follow through the Plan right there * * *." [Tr. p. 185.] When asked about the people he sells to, he similarly testified, in most unenlightening fashion, "Well, they wouldn't go beyond—because this program right here they can't go beyond their own limitations."

"Q. They can't go beyond their own limitations?"

A. No, sir.

Q. What is a person's limitation? A. His own requirements.

Q. What do you mean by requirements? A. I mean by his natural law." [Tr. p. 185.]

In brief, appellees advertise that by following their "Plan," including the prescribed consumption of "Foods that take Hunger Away," people will lose weight in large amounts rapidly, feel better, and more energetic, and that this regimen can be followed without danger, irrespective of age or condition of health. However, when cross-examined, appellee Williams testified that conscientious adherence to the Plan would weaken him to the point of illness but would not do so to persons following his "Plan," not because of any warnings given by him, but because of some completely undefined inchoate principle which he mysteriously labels as "natural law."

(2) THE EVIDENCE OF DR. PUTNAM WAS SCIENTIFICALLY FACTUAL AND IS ENTITLED TO CREDENCE.

In a further attempt to bring themselves within the *McAnnulty* decision, appellees assert that Dr. Putnam's testimony was purely opinion, bordering on guesswork (III, App. Br. pp. 19 *et seq.*)

Their analysis concludes with the entirely unsupportable averment that Dr. Putnam may have been further handicapped in testifying by a "prosecutor complex" for which there is absolutely no support in the record (App. Br. p. 33). Appellant's Opening Brief has discussed in detail Dr. Putnam's qualifications, his testimony, the scientific tests made and his knowledge about the "Food" tablets and massage "Creme" [Tr. pp. 132-133, 153] so as to render needless reiteration in refutation of appellees' unjustifiable charges of vagueness, uncertainty and in-

competence. However, certain contentions advanced by appellees so torture the record as to render comment desirable.

Primarily, appellees strive to discredit this medical expert by pinning him with the appellation of "label reader" (App. Br. pp. 20, 33). However, in complete refutation, the record reveals [Tr. pp. 103, 104]:

"Q. Will you tell us, Doctor, what your duties are at the Food and Drug. A. My duties at the Food and Drug Administration include the examination of labels to determine whether or not they comply with the various sections of the Food, Drug and Cosmetic Act. Medical advice is given when necessary on problems as they arise in the enforcement of this Act.

Q. Have you made a special study, Doctor, of the condition known as obesity and its causes and treatment? A. I have."

"Glaring inaccuracies" in Dr. Putnam's caloric analysis of appellees' plan is next charged (App. Br. pp. 21-25). If, as appellees urge, the caloric intake was not as reduced as they assert Dr. Putnam claims, then loss of weight could not take place in the unusual amounts and with the rapidity that appellees advertise [Tr. p. 117].

Appellees, in this connection, purport to recalculate the "true" caloric intake under the "Plan." By assuming a maximum intake of "Food" tablets with *full* glasses of fruit juice, they attain a *per diem* maximum of 1650 calories, rather than 850. This is based on the assumption that each glass of fruit juice equals approximately 100 calories. However, on page 22 of their brief, appellees reveal that the directions only specify taking of tablets with 1/2 glass of fruit juice or *with* water. Obviously, if

the follower adhering to the "Plan" only uses water, his added caloric intake over 850 would only be 20 (10 tablets per day of 2 calories apiece). If he uses fruit juice, at $\frac{1}{2}$ glass per tablet dose, his caloric intake would be 850, plus 400 for fruit juice, plus 20 for tablets, or a total of 1270 calories.

It is significant that in making their computation, appellees only increased by the caloric value of the fruit juices, *without including the tablets*, thus recognizing that such "Food" tablets are of little or no worth, despite their unqualified assertions to the contrary (Appellant's Op. Br. pp. 5-7). The fruit juices can be obtained from the grocer—not appellees—without incurring the useless added expenses of purchasing the "Food" tablets.

Appellees next attempt to discredit Dr. Putnam's testimony as to the dangerous effects that the "Plan" might have, particularly on sufferers of tuberculosis or diabetes (App. Br. p. 26). They curtly answer his positive testimony by merely urging that anyone who knows he has tuberculosis or diabetes is usually under medical supervision and is not apt to undertake a reducing program.

This answer is hardly consistent with appellees' basic contention that the advertisements issued by them are not misrepresentations. Those advertisements state without qualification that the "Plan" together with "Foods that take Hunger Away" are adaptable to persons of all ages, will increase their pep and energy and make them feel better. Not everyone suffering from diabetes or tuberculosis is aware of the presence of the disease. If unaware and still obese, appellees' advertising is well calculated to convince them that an easy, comfortable and eminently safe means of reducing weight, a panacea in the field of obesity, is being held forth and they may well be

tempted to pay the price and adhere to the "Plan" to their ultimate physical destruction. Nowhere do appellees apprise victims of such diseases that loss of weight—particularly in the gigantic proportions advertised by appellees—can possibly be detrimental to their condition. In fact, the advertising would lead them to a completely contrary conclusion.

However, the law, as embodied in the fraud order statutes of the United States, is interpreted to protect such victims. Thus, in reversing a judgment enjoining the enforcement of a postal fraud order, the United States Supreme Court in the recent case of *Donaldson v. Read Magazine*, 333 U. S. 178, 189 (1947), said:

"* * * people have a right to assume that fraudulent advertising traps will not be laid to ensnare them. 'Laws are made to protect the trusting as well as the suspicious,' *Federal Trade Comm'n v. Standard Educational Society*, 302 U. S. 112, 116."

On pages 29-31 of their brief, appellees undertake to dispose of cogent authorities cited in Appellant's Opening Brief, not by discussing the material and dispositive facts, but by the unique practice of "counting noses," namely, how many experts were produced in each. Upon occasion, they vary by asserting that such experts had "wide" experience but Putnam did not, despite clear-cut refutation of such an erroneous conclusion in the record.

In contending that their representations that no strict diet is involved are true (App. Br. pp. 34-35), appellees state that descriptive words such as "strict" are merely justifiable puffing. In brief, exaggeration that might be condoned in the purchase of a horse is perfectly legitimate, according to appellees, in foisting the sale of a reducing plan upon human beings.

Nor does *Carley Company v. Federal Trade Commission*, 139 F.2d 493, in any way support appellees in this unusual assertion. There, the plan called for the eating of one caramel candy before each meal and it was represented that weight would be lost as the result without strict diet. It was admitted that consumption of sweets before eating caused loss of appetite, resulting in no need for deliberate refraining from eating. No ruling could be more dissimilar from the instant case.

(3) APPELLEES RECEIVED A FULL, FAIR AND IMPARTIAL HEARING.

Appellees urge: (1) The Department spent seven months in preparing the case and appellees only had three weeks for their preparation; (2) Appellees and their counsel were unfamiliar with the procedure followed in such cases before the Post Office Department and did not realize the necessity for medical testimony; (3) Two days before the hearing an additional charge was made against appellees and was allowed by the hearing officer over appellees' objections; (4) The testimony of appellee Williams was excluded as to medical matters; (5) Testimonial letters of satisfied customers were excluded; and (6) Appellees' motions to take the depositions of Doctors Pfleuger and Beistel in California and to have the Post Office Department make all possible scientific tests to determine the efficacy of the tablets for the prevention of hunger were denied (App. Br. pp. 36-43).

These contentions need not detain us: That the Post Office Department had more time to prepare than appellees is something that occurs in every litigation. A plaintiff always has more time to prepare because the defendant does not learn of the suit until served and then his time to

answer or otherwise act is limited by statute or court rule. That appellees and their counsel were unfamiliar with Post Office Department procedure is nothing more than pleading ignorance of the law as a defense. Nor can appellees complain that they were deprived of adequate opportunity to present medical testimony for, as stated by the Post Office Department attorney at the hearing [Tr. p. 165], counsel for appellees could have asked for a continuance if difficulty in obtaining medical testimony occurred, that that was a well-known procedure and certainly would have been granted if requested. However, no such request was made.

Counsel distorts the record in claiming that a last minute amendment involving a new charge was forced upon appellees (App. Br. p. 38). A comparison of the charges originally made [Tr. p. 45] with the proposed amendment [Tr. p. 47] shows that such amendment was substantially covered by the original charges and, in fact, subjected appellees to no additional last-minute burden. Further, the hearing officer clearly stated that he did not wish to put appellees to the hardship of defending against anything of which they had not adequate notice and, therefore, only *conditionally* allowed the amendment subject to the provision that it would be subject to a motion to strike if appellees were unprepared to present proof thereon [Tr. p. 51].

The exclusion of Williams' testimony on medical matters was discussed heretofore. The exclusion of the testimonials was proper on the grounds, among others, that the writers thereof were not before the hearing officer, could not be subjected to examination or cross-examination, and, as pointed out by Dr. Putnam [Tr. pp. 153-154], the lay consumer of the "Food" tablets who takes them with

soup, fruit juice or milk cannot tell whether the temporary disappearance of hunger pains is due to the effect of the tablets or to the juice, milk, or soup.

Strangely enough, although the motions for the taking of the depositions of Doctors Pflueger and Beistel were made approximately two months after the close of the hearing, they still could not come to Washington and testify before the hearing officer. During the interim following the closing of the hearing, appellees had apparently made no effort to obtain available medical testimony which could be heard in Washington, D.C. Further, as previously noted, at the hearing, no continuance was requested for the purpose of obtaining medical testimony.

The foregoing are clearly indicative of the fact that appellees had no desire to meet head-on the medical issues involved in the case.

Last, the motion requesting all possible scientific tests to be made by the Post Office Department to determine the efficacy of the "Food" tablets sold by appellees, sought to impose upon that agency the necessity of obtaining human guinea pigs, if possible, for a needless test. The "Food" tablets had already been subjected to chemical and micro-analyses showing the contents, caloric value, weight and bulk of the tablets and, as previously noted, the Post Office Department's medical expert, Dr. Putnam, was fully acquainted with those facts. Hence, there was no need for the making of the additional tests requested by appellees. It would seem that appellees, who extravagantly advertised such tablets as preventing hunger and increas-

ing pep and energy, for the purpose of obtaining the public's money through the mails, should have done some testing themselves before they made such unqualified and completely false misrepresentations.

Conclusion.

This case clearly falls within the rule of *Leach v. Carile*. The factual scientific evidence adduced shows that appellees have advertised a panacea for the obese but the "Plan" and its concomitant fall far short of the representations made. Appellees, in a frantic attempt to escape this clear conclusion, have indulged in repeated distortions of the record and a complete disregard of the actual facts of the many authorities cited by appellant in his Opening Brief. The crowning misstatement indulged by appellees is embodied in the misstatement (App. Br. p. 18) that "The Postmaster has been repeatedly restrained by the courts from giving the force and effect of law to his personal opinions * * *." A reading of the many authorities cited in both briefs clearly shows that it is indeed a rarity for any tribunal to set aside a fraud order issued by the Postmaster General.

If the judgment below is affirmed and appellees permitted to continue obtaining money from the public through their false and fraudulent misrepresentations, a roadblock to proper consumer protection will indeed exist. Neither the Food and Drug Administration nor the Federal Trade Commission will be free of the unduly restrictive interpretation given by the court below to the *McAn-*

multy case. Quacks and charlatans will indeed prosper at the expense and suffering of the general public.

Hence, the judgment should be reversed, the injunction vacated and the complaint dismissed.

Respectfully submitted,

H. G. MORISON,
Assistant Attorney General,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
*Assistant United States Attorney,
Chief of Civil Division,*

BERNARD B. LAVEN,
*Assistant United States Attorney,
Attorneys for Appellant.*

Of Counsel:

EDWARD H. HICKEY,
Special Assistant to the Attorney General,

HOWARD C. WOOD,
Attorney, Department of Justice,

WILLIAM C. O'BRIEN,
Attorney, Post Office Department.

No. 11999

United States
Court of Appeals

for the Ninth Circuit

HARRY A. ROBERTS and RUTH M. ROBERTS,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review a Decision of The Tax Court
of the United States

FILED

SEP - 8 1948

No. 11999

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HARRY A. ROBERTS and RUTH M. ROBERTS,
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APPEARANCES:

For Petitioner:

GILBERT J. HEYFRON,
EARL E. HOWARD,
ALVA C. BAIRD,
NORVALD T. ULVESTAD.

For Respondent:

A. J. HURLEY.

Docket No. 11856

HARRY A. ROBERTS and RUTH M. ROBERTS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1946

Aug. 21—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 22—Copy of petition served on General Counsel.

Oct. 8—Answer filed by General Counsel.

Oct. 8—Request for hearing in Los Angeles, California, filed by General Counsel.

Oct. 17—Notice issued placing proceeding on Los Angeles Calif. calendar. Service of answer and request made.

1947

Sept. 30—Hearing set Dec. 1, 1947, Los Angeles.

Dec. 12—Hearing had before Judge Disney on merits. Petitioner's brief due Jan. 2, 1948; respondent's brief due 1/20/48; petitioner's reply due 2/5/48.

Dec. 30—Transcript of hearing 12/12/47 filed.

Dec. 30—Brief filed by taxpayer. Copy served.

1948

Jan. 19—Brief filed by General Counsel.

Mar. 2—Reply brief filed by taxpayer (1). Copy served by attorney. (2 copies received 3/15/48.)

Mar. 31—Findings of fact and opinion rendered, Judge Disney. Decision will be entered for the respondent. 4/1/48 Copy served.

Apr. 2—Decision entered, Judge Disney, Div. 4.

Apr. 6—Entry of appearance of Gilbert J. Heyfron as counsel filed.

Apr. 13—Entry of appearance of Earl E. Howard, as counsel filed.

June 24—Petition for review by U. S. Circuit Court of Appeals for the 9th Circuit with assignments of error filed by taxpayer.

July 6—Proof of service filed by taxpayer.

June 24—Designation of record filed by taxpayer.

July 15—Agreed revised designation of record filed. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 11856

HARRY A. ROBERTS and RUTH M. ROBERTS,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated May 29, 1946, and as a basis of this proceeding allege as follows:

1. The petitioners are now and were, during the taxable period here involved, husband and wife. They reside at 429 South Union Avenue, Los Angeles, California. Their return for the period here involved was filed with the Collector for the Sixth District of California.

2. The notice of deficiency, a copy of the material parts of which is attached hereto and marked Exhibit "A" was mailed to the petitioners on May 29, 1946.

3. The tax in controversy is income tax for the year 1943 in the amount of \$144.34 all of which is in dispute. [2]

4. The determination of the deficiency set forth in said notice is based upon the following errors:

(1) The Commissioner erred in determining that the wages of the taxpayers should be increased for the taxable year involved in the amount of \$661.94.

(2) The Commissioner erred in disallowing a deduction of \$100.00 expended for uniforms required to be worn by the petitioner, Harry A. Roberts, in the course of his employment.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) During the taxable year involved the petitioner was employed as a driver by the Yellow Cab Co. of California. During this period he received from patrons certain gifts or gratuities of an undetermined amount. The sums so received were in the nature of gifts and were not required to be paid by patrons of the said Yellow Cab Co. for whom he was rendering service. A regular established fare was fixed by petitioner's employer for the transportation of its patrons and your petitioner was at all times required to transport the patrons of said company at said established rate of fare and was strictly forbidden to ask for, seek or demand either directly or indirectly any additional compensation for said service but occasionally passengers of their own volition would give the petitioner, Harry A. Roberts, small gratuities in addition to the regular fare. This was always a voluntary act on their part and was in no sense a required payment to be made for the service rendered. [3]

The gifts or gratuities received as aforesaid by the petitioner, Harry A. Roberts, were not in payment of or compensation for services rendered by him or his employer and were not income within the meaning of the Internal Revenue Code.

(b) While on duty in the course of his employment as a driver for said Yellow Cab Co. of Cali-

fornia, petitioner, Harry A. Roberts, was required to wear a standard uniform meeting the requirements of the company. Your petitioner alleges that said uniform was not suitable or appropriate for ordinary civilian wear and that in the taxable year 1943 he expended for said uniforms and the repairs and upkeep thereof the sum of \$100.00; that said expense thus incurred was an ordinary and necessary business expense in the course of his trade or business.

Wherefore, your petitioners pray that the Court may hear this proceeding and disallow the deficiency determined by the Commissioner.

/s/ GILBERT J. HEYFRON,

/s/ EARL E. HOWARD,

/s/ ALVA C. BAIRD,

/s/ NORVALD T. ULVESTAD,

Attorneys for the Petitioners. [4]

State of California,

County of Los Angeles—ss.

Harry A. Roberts and Ruth M. Roberts, being duly sworn, state that they are the petitioners above named; that they have read the foregoing petition, are familiar with the statements contained therein, and that the statements contained therein are true.

/s/ HARRY A. ROBERTS,

/s/ RUTH M. ROBERTS.

Subscribed and sworn to before me this 15th day of August, 1946.

(Seal)

ELSIE GALE,

Notary Public in and for said County and State. [5]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles, 13, California

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:LHP

May 29, 1946

Mr. Harry A. Roberts, and
Mrs. Ruth M. Roberts,
Husband and Wife,
429 South Union Avenue,
Los Angeles, 13, California.

Dear Mr. and Mrs. Roberts:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$144.34 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (Not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

Enclosures: Statement, Form of Waiver. [6]

STATEMENT

LA:IT:90DLHP

Mr. Harry A. Roberts, and Mrs. Ruth M. Roberts,
Husband Wife,
429 South Union Avenue,
Los Angeles 13, California

Tax Liability for the Taxable Year Ended
December 31, 1943

	Deficiency
Income and victory tax.....	\$144.34

In making this determination of your income and victory tax liability careful consideration has been given to the report of examination dated November

27, 1945, and to your protest dated January 29, 1946.

For the purpose of determining your income tax liability for the year 1943 under the Current Tax Payment Act of 1943, the tax liability reported in your 1942 return in amount of \$85.00 is accepted as correct.

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1943

	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return.....	\$2,276.99	\$2,597.29
Unallowable deductions and additional income:		
(a) Wages increased	661.94	661.94
(b) Other deductions disallowed.....	100.00
	<hr/>	<hr/>
Net income adjusted.....	\$3,038.93	\$3,259.23

EXPLANATION OF ADJUSTMENTS

(a) There has been added to your income the amount of \$661.94 representing tips received by you which you failed to report in [7] your return. This income is held to be taxable under the provisions of Section 29.22(a)-2 of Regulations 111.

(b) The deduction of \$100.00 for uniforms is disallowed as not representing a proper deduction under the provisions of Section 23(a) of the Internal Revenue Code.

COMPUTATION OF INCOME AND VICTORY TAX—CURRENT TAX PAYMENT ACT OF 1943

Taxable Year Ended December 31, 1943

Income tax net income adjusted.....	\$3,038.93	
Less: Personal exemption.....	\$1,200.00	1,200.00
		<hr/>
Surtax net income.....		\$1,838.93
Less: Earned income credit.....	\$ 303.89	303.89
		<hr/>
Income subject to normal tax.....		\$1,535.04
Normal tax at 6 per on \$1,535.04.....	92.10	
Surtax on \$1,838.93	239.06	
Total income tax.....		\$ 331.16
Net income tax.....		\$ 331.16
Victory tax net income adjusted.....	\$3,259.23	
Less: Specific exemption	1,248.00	
		<hr/>
Income subject to victory tax.....	\$2,011.23	
Less: Specific exemption.....	1,248.00	
		<hr/>
Income subject to victory tax.....	\$2,011.23	
Victory tax before credit (5% of \$2,011.23) \$	100.56	
Less: Victory tax credit (40%).....	40.22	
		<hr/>
Net victory tax		60.34
		<hr/>
1. Net income tax and victory tax.....	\$	391.50
2. Income tax for 1942.....	\$	85.00
3. Amount of item 1 or 2, whichever is larger		\$ 391.50
4. Forgiveness feature:		
(a) Amount of item 1 or 2, which- ever is smaller.....	\$ 85.00	
(b) Amount forgiven ($\frac{3}{4}$ of (a)).....	63.75	
		<hr/>
(c) Amount unforgiven		21.25
5. Correct income and victory tax liability (item 3 plus item 4(c)).....	\$	412.75
6. Income and victory tax liability shown on return, account No. 8282363.....		268.41
		<hr/>
7. Deficiency of income and victory tax.....	\$	144.34

[Endorsed]: Filed Aug. 21, 1946. [9]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is income tax for the year 1943; denies the remainder of the allegations contained in paragraph 3 of the petition.

4 (1) and (2). Denies the allegations of error contained in subparagraphs (1) and (2) of paragraph 4 for the petition.

5 (a). Admits that during the taxable year involved the petitioner was employed as a driver by the Yellow Cab Company [10] of California and that during this period he received from patrons certain sums in addition to the regular established fare fixed by petitioner's employer for the transportation of its patrons. Denies, however, that the sums so received were in the nature of gratuities or gifts and denies the remainder of the allegations contained in and set forth under subparagraph (a) and subdivision thereof of paragraph 5 of the petition.

5(b). Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

6. Denies each and every allegation contained in

the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
A. J. HURLEY,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: Filed Oct. 8, 1946. [11]

10 T. C. No. 75

The Tax Court of the United States

Harry A. Roberts and Ruth M. Roberts, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 11856

Promulgated March 31, 1948

The petitioner, a taxicab driver, received tips with fares collected from passengers. Held, that such tips are income. Held, further, on the facts that the Commissioner is not shown to have erred in adding to petitioner's income 10 per cent of his gross receipts because of such tips, in the absence of any

record kept by the petitioner. Held, further, on the facts that the Commissioner is not shown to have erred in denying deduction of costs of uniforms.

Gilbert J. Heyfron, Esq., and Earl E. Howard, Esq., for the petitioners. A. J. Hurley, Esq., for the respondent.

This case involves income taxes for the calendar year 1943. Deficiency was determined in the amount of \$144.34, all of which is in issue. The [12] questions presented are (a) whether "tips" received by petitioner, Harry A. Roberts, as a taxicab driver constitute income; and (b) whether the amount thereof was properly determined by the Commissioner; and (c) whether the expense of a uniform is business expense deductible by the petitioner.

FINDINGS OF FACT

The petitioners are husband and wife. They filed a joint federal income tax return for the taxable year with the collector for the sixth district of California. During the taxable year the petitioner, Harry A. Roberts (hereinafter referred to as petitioner), was employed as a taxicab driver by the Yellow Cab Co. of California, in Los Angeles. During the year he received from patrons sums of money, ordinarily called "tips," in addition to the regular established fare for the transportation of patrons. He kept no record thereof. About 50 per cent of passengers tipped. He had instructions, in his contract with the Yellow Cab Co., not to solicit tips, was forbidden to do so, and did not do so. He was allowed to charge only what the taxicab meter

showed. In his contract incidental service, such as, carrying of bags, was included in the wages received. His wages were, in 1943, 45 per cent of the take, or \$6 a day, whichever was greater. He worked in 1943 about 240 to 250 days. A fifty cent fare is typical, and the usual tip therefor is ten cents. It is the same for an eighty cent fare. A \$1 fare usually does not carry a tip. On a thirty cent fare the tip is usually ten cents, sometimes fifteen. The average fare is about eighty cents. On \$10, \$5, or \$3 trips there is usually no tip. On a \$15 or \$20 trip, which is uncommon, the average tip would be 25 to 50 cents. There would be five or six \$5 trips, [13] and not more than one \$10 trip in a month. He conveyed passengers under charge accounts also and those who used Yellow Cab script, from whom no tips were received. The year 1943 was better than average; gasoline rationing approximately trebled the number of taxicab patrons so far as tips were concerned. A tip is rarely less than ten cents. Tips average, conservatively and reasonably, 10 per cent of gross bookings. Tips were more liberal during war time than in ordinary times.

The petitioner in 1943 paid \$30 for a uniform, \$24 for trousers and used several shirts. The uniform was oxford gray, with gray shirt. In 1943 the Yellow Cab Co. had no uniforms to sell and the men wore that they were able to get. The company did not require the drivers to purchase uniforms.

OPINION

Disney, Judge: We will first dispose of the question as to whether the Commissioner erred in con-

sidering 10 per cent of the petitioner's take as a taxicab driver as the amount of the tips. The question is one of fact. The evidence was varied and contradictory. It would serve no purpose to analyze it in detail. Considering all the evidence, we have found as a fact that the tips over the year were conservatively 10 per cent of the petitioner's gross take. There is no argument as to the amount of such gross take. Therefore, as to the amount, the Commissioner is not shown to have erred in adding \$661.94 to petitioner's income.

We next consider the question as to whether such amount constituted income to the petitioner. It is submitted to us in substance as one of first impression, for though the respondent cited Nazzareno D. Cesanelli, 8 T.C. 776, [14] he agrees with the petitioner that, though tips were therein involved, no issue was presented as to whether they constituted income to the petitioner. No other is cited as controlling. The petitioner argues that the tips were gratuities, gifts; the respondent, that they are compensation for services. He cites Regulations 111, Sec. 29.22(a)-2, covering section 22(a) of the Internal Revenue Code, which includes tips within gross income. Relying upon the Cesanelli case, he says that though the present issue was not presented there, the Court found a fraud penalty for failure to report the full amount of tips received, and therefore the Court necessarily had to consider the question, since there could have been no fraud in failing to report money unless it was income. We think the point not well taken. We can not logically

get assistance on this very real issue from a case which did not raise it. The Court, assuming that in that case the tips were income because the point was not questioned, properly did not need to consider it, and merely held that the amount duly ascertained was fraudulently not reported as income.

Nor will we put the conclusion here upon the fact that the regulation includes tips in income. The sweep of section 22(a) and its definition or description of gross income is broad, and it may be that the regulation with propriety validly construes tips as within its orbit. But considering the conclusion to which we have come we pass the point.

For we view the tips involved in this case as income. Webster's New International Dictionary defines "tip", a colloquial term, as meaning both gift and fee. Obviously, therefore, such definition helps not at all here. If the tips were compensation for services rendered, they are income. The [15] petitioner so agrees on brief, saying that the income tax act is to impose tax "upon income and not upon gifts, unless the money allegedly 'given' is in essence compensation for services or value." We think they were compensation for services. Taxation is a realistic matter, often so called. It would, in our opinion, be decidedly unrealistic not to consider that one tips taxicab drivers for service and as part of the pay therefor. That the evidence here is that the Yellow Cab Company forbade solicitation of tips and that they were not solicited proves little or nothing as to the situation between passenger and driver. For what was the petitioner as driver paid?

The common practice of tipping is proved here, if it requires proof; and imagination need not be strained to realize, so to speak, the lessened service forthcoming if passengers ceased tipping. This is not a matter of gift disassociated from service. Though gifts are perhaps ordinarily made on a personal basis, the prevalence of impersonal gifts, such as to organized charities, makes it impossible to require the personal touch in order to find gift. But where, as here, the alleged gift is contemporaneous with payment for services, the petitioner has no easy burden to show it no integral part thereof. That the payment may be a little more than absolutely necessary for the services does not, as we see it, demonstrate that it was not nevertheless payment. We consider of slight weight petitioner's argument that the tip is caused by a desire to save "face", or a desire to prove the "tippee" inferior to "tipper", or because the "tipper" likes his fellow man. We think the milk of human kindness has little to do with the matter and that the ordinary passenger is neither trying to save his face nor concerned with [16] demonstrating superiority. The passenger tips because the taxi driver expects to receive tips, and the passenger expects to pay something extra for the service.

We think that the question has, though indirectly, been definitely decided by a case not cited, *F. L. Bateman*, 34 B.T.A. 351. There we considered as tips payments made by the petitioner, a shipper of freight, to office agents, shipping clerks, and railroad and steamship employees. The situation had

in fact less connection with payment for services than in the instant case, for there the various persons receiving tips, such as shipping clerks and dock workers handling freight forwarded by petitioner, appear to have had no right at all to receive any payment from the petitioner who was not their employer; whereas here, as above seen, the tip accompanied a regular payment. Yet in the Bateman case the giver of the tip was held entitled to deduction of the amounts involved as business expenses. But to so hold, the opinion necessarily recognized the payments as made "for personal services actually rendered" within the language of section 23(a)(1)(A) of the Internal Revenue Code. Under such decision, the passenger paying the petitioner his tip had a right to deduct the amount as expense. Therefore, though we do not categorically brand the payment and receipt as necessarily reciprocal, we regard the case as demonstrative that tips are compensation for services rendered and, under the test suggested by the petitioner's brief, as income. Though, as petitioner says, intent is to be regarded, we regard the above case as a solid view of the intent involved; moreover, we do not find the intent in paying taxi tips to be donative. It is, in a very real sense, a [17] business transaction—as the Bateman case regarded it.

We have examined Herbert's *Laurel-Ventura vs. Laurel Ventura Holding Corporation*, 138 Pac. (2d) 43, and *Anders vs. State Board of Equalization*, 185 Pac. (2d) 883, (both from California courts), though they were not cited. If the reason for non-

citation was that they were considered inapplicable, we agree; for the former involves the question as to whether tips received by employees are gross receipts of an employer-landlord, who had agreed to pay a percentage of gross receipts as rent; and the latter involved the question whether employees' tips were the employer's receipts for purposes of a sales tax. We consider it obvious that the cases are of no assistance on the present question. We conclude and hold that the tips paid the petitioner were income to him.

The remaining question involves the expense of uniforms. Here, again, the testimony is in conflict as to whether uniforms were necessary. From what we regard as the better testimony, because disinterested, we find that they were not required. The evidence was, further, that in 1943 the Yellow Cab Company had no uniforms to sell and that the men had to wear what they were able to get. Under these findings, it is clear that the petitioner was acting voluntarily in buying anything in the way of uniforms, and such dress merely took "the place of an article required in civilian life" within the language of Regulations 111, section 29.24-1. Business expenses must be necessary. This one was not. We hold that the Commissioner is not shown to have erred in denying deduction for uniforms. *Marcus O. Benson*, 2 T.C. 12; *affd.*, 146 Fed. (2d) 191.

Decision will be entered for the respondent. [18]

The Tax Court of the United States
Washington

Docket No. 11856

HARRY A. ROBERTS and RUTH M.

ROBERTS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated March 31, 1948, it is

Ordered and Decided: That there is a deficiency in income tax of \$144.34 for the calendar year 1943.

/s/ R. L. DISNEY,

Judge.

Entered April 2, 1948. [19]

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 11856

HARRY A. ROBERTS and RUTH M.

ROBERTS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Taxpayers, the petitioners in this cause, by Gilbert J. Heyfron and Earl E. Howard, Esquires,

their counsel, hereby file their petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on April 2, 1948, 10 T. C. No. 75, determining deficiency in the petitioners' Federal income taxes for the calendar year 1943, in the amount of \$144.34, and respectfully show:

I.

The petitioner, Harry A. Roberts, at the time in controversy was a taxicab driver employed by the Yellow Cab Company in Los Angeles, California, and the petitioner, Ruth M. Roberts, is his wife.

II.

Nature of the Controversy

The controversy involves the proper determination of the petitioners' liability for Federal income taxes for the calendar year 1943.

In the trial court, it was the petitioners' contention that the Commissioner erred in determining that the wages of the tax payers should be increased for such taxable year in the amount of \$661.94, such increase having been based upon the Commissioners arbitrarily applying a rule of thumb of 10 per cent of the gross bookings of the taxpayer, Harry A. Roberts, in the operation of taxicabs for the Yellow Cab Company. Said arbitrary increase was based upon the Commissioner's theory that "tips" should be considered a part of the taxpayer's compensation.

Before the trial court, it was the petitioners' contention that the Commissioner should have al-

lowed a deduction of \$100.00 expended for uniforms. Since the evidence before the trial court was conflicting as to whether such uniforms were necessary, the petitioners are not further urging their contention in this latter respect.

The petitioners in their return for the taxable year involved included nothing for "tips" received.

III.

The taxpayers, being aggrieved by the findings of fact and conclusions of law contained in the opinion of the tax court and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit. [21]

IV.

ASSIGNMENTS OF ERROR

The petitioners assign as error the following acts and omissions of the Tax Court of the United States:

(1) The failure to eliminate from the petitioners' gross income for the year 1943 the amount of "tips" arrived at by the arbitrary assessment, in that such "tips" do not constitute any part of the taxpayers' wages or compensation for services, but in truth and fact are gifts.

(2) The failure of the Court to determine that the rule of thumb of 10 per cent of gross "take" applied by the Commissioner by reason of the alleged failure of the taxpayers to keep adequate records, is arbitrary and unreasonable and is not

supported by the great preponderance of the evidence.

GILBERT J. HEYFRON,
EARL E. HOWARD,
Counsel for Petitioners. [22]

(Duly Verified.)

[Endorsed]: T.C.U.S. Filed June 24, 1948. [23]

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the petitioners on the 22nd day of June, 1948, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated at Los Angeles, California, this 22nd day of June, 1948.

Respectfully,

/s/ GILBERT J. HEYFRON, [24]

/s/ EARL E. HOWARD,

Counsel for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed July 6, 1948. [25]

Official Report of Proceeding Before The Tax
Court of the United States

Docket No. 11856

HARRY A. ROBERTS, et al.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Hearing at Los Angeles, California

December 12, 1947 [26]

EXCERPTS FROM THE TRANSCRIPT
OF TESTIMONY

* * * *

HARRY A. ROBERTS,

Petitioner, called as a witness for and on his own
behalf, having been first duly sworn, was examined
and testified as follows:

The Clerk: Tell us your name, Mr. Witness,
please.

The Witness: Harry Alexander Roberts. [27]

Direct Examination

By Mr. Howard:

Q. What is your occupation, Mr. Roberts?

A. Taxicab driver.

Q. How long have you been thus engaged?

A. Seven years.

Q. By whom are you employed?

A. The Yellow Cab Company.

Q. Were you so employed during the year 1943?

A. Yes.

(Testimony of Harry A. Roberts.)

Q. And still are? A. Yes, sir.

Q. In the year 1943 you filed your income tax return, I take it, Mr. Roberts? A. Yes, sir.

Q. Did you or did you not include any money received as tips? A. I did not.

The Court: Counsel, you haven't asked him where he was employed. The situation might be different in different cities.

By Mr. Howard:

Q. During this year 1943 and up to the present time, will you state the place of your employment?

A. Yellow Cab Company in Los Angeles, California. [28]

Q. By Los Angeles, California, what districts does that include?

A. You mean the surrounding territory that we work?

Q. Yes.

A. Los Angeles, Beverly Hills, Hollywood, North Hollywood, and West Los Angeles.

Q. In that period of time you worked also generally within the limits of the City of Los Angeles?

A. Yes, sir.

Q. After you filed your 1943 return without including tips, about when was it that you were summoned to the Collector's office and requested to file an amended return to include tips?

A. Approximately a year afterwards.

Q. Did you receive any advice of counsel as to whether or not you should include tips either in your original return or your amended return?

(Testimony of Harry A. Roberts.)

A. Not in my original, I don't believe.

Q. On your amended return did you—the amended return that was requested at that time—had you received advice of counsel that tips were not a part of a taxable income? A. I was.

Q. Now, during the period of the year 1943, you did receive certain tips, did you not?

A. I did. [29]

Q. From passengers? A. Yes.

Q. Did you in the year 1944 or '45, whenever it was that the request to file an amended return was made upon you, have any record of the amount of tips you received? A. No, I didn't.

Q. You have no such record now?

A. No, sir.

Q. Are you able to state generally what proportion of your passengers tipped or did not tip?

A. Well, I would say approximately 50 per cent.

Q. Of that 50 per cent of the passengers who did tip, what would you consider, assuming that tips are taxable income, would be a fair percentage of your gross bookings?

A. Approximately 10 per cent of that.

The Court: Read that question to me, Mr. Reporter.

(The question was read.)

By Mr. Howard:

Q. By "gross bookings," I mean of the gross amount you received from the passengers who did tip. What would be a fair percentage, in your mind? A. About 10 per cent.

(Testimony of Harry A. Roberts.)

Q. Of those who did tip?

A. Of those who did tip, yes, sir.

Q. In other words, the amount of an individual [30] passenger's bill, who tipped you, you would consider 10 per cent fair? A. Yes, sir.

Q. But that, in your opinion, would not include those who didn't tip?

The Court: This is your own witness. Don't lead him. You will discount his testimony if you do.

By Mr. Howard:

Q. Now, in your contract with the Yellow Cab Company, state whether or not you had any instructions or directions not to solicit tips or gratuities.

A. We have instructions not to in any way whatsoever or any services whatsoever that we do for them. I am only allowed to charge them what the meter says, and that is all.

Q. Now, in the tips that you did receive during this time, were there any such tips received by reason of solicitation upon your part?

A. No, sir.

Q. Now, in your contract with the Yellow Cab Company, are such incidental services as the carrying of bags or the like included in your wages paid by the company? A. Yes, they are.

Q. Mr. Roberts, can you think of any service in the year 1943 that you rendered to any passenger that was not compensated for to you by your employer, the company? [31] A. I cannot.

(Testimony of Harry A. Roberts.)

Q. What was the basis of your compensation from the Yellow Cab Company during the year 1943? A. You mean my salary?

Q. Yes, whatever they agreed to pay you.

A. In 1943, I think it was 45 per cent of the take, or \$6.00 a day, whichever was the greater.

Q. Approximately how many days did you work, working days or nights, in 1943?

A. Days, I worked approximately 240-250 days, I imagine, a year.

The Court: You were also asked about nights.

The Witness: I did not work nights. [32]

* * * *

Cross Examination

By Mr. Hurley:

Q. Mr. Roberts, you testified that approximately 50 per cent of your patrons tipped, is that correct?

A. Fifty per cent, yes.

Q. Yes. Let's consider for a moment an average fare, a 50-cent fare, for example. That would be a typical fare, is that correct, in this city?

A. That is right.

Q. Now, let's confine ourselves for a moment simply to the patrons who tip. Now, let's take the example of a tipping [33] patron on a 50-cent fare. How much of a tip do you usually get from such a patron? A. From a 50-cent fare?

Q. Yes. A. It is usually a dime.

Q. I see. What percentage is a dime of 50 cents?

(Testimony of Harry A. Roberts.)

Mr. Howard: It is a matter of computation, we will stipulate.

Mr. Hurley: If the Court please, I don't wish to trick the witness into making—

The Court: The objection is overruled.

By Mr. Hurley:

Q. What percentage of 50 cents is a dime?

A. What percentage of 50 cents is a dime?

Q. Yes.

A. It would be 20 per cent, wouldn't it?

Q. That is right. Now, if half your fares tip, and if that half would give on the average of 20 per cent, your over-all tips, counting tippers and non-tippers, would approximate 10 per cent, is that correct?

Mr. Howard: I object to the question as misleading unless it refers to a 50-cent trip.

Mr. Hurley: Let's assume for the moment that it refers to a 50-cent trip.

The Court: Assume that in answering the question, [34] if you can.

The Witness: Would you repeat it, please?

By Mr. Hurley:

Q. Well, you see what I am getting at, Mr. Roberts. Apparently on direct examination your testimony was that since 10 per cent of the gross bookings is the average tip, and since only half of your patrons, in your experience, are actually tippers, that reduces the percentage of over-all bookings to 5 per cent. Is that the substance of your testimony on direct examination? A. That is right, sir.

(Testimony of Harry A. Roberts.)

Q. Well, what I am trying to point out, Mr. Roberts—and you are at liberty to explain what you mean—is that, where only half of your patrons tip, if they tip over 10 per cent, as you testified a moment ago, the 50-cent patrons do, it raises it above 5 per cent, doesn't it, upon the gross bookings?

A. Yes.

Q. Let's take another example. Let's take an 80-cent fare and let's again confine ourselves simply to the tippers. Now, you have in your cab an 80-cent fare who is a tipper. How much does he usually tip you?

A. They usually tip a dime also.

Q. They usually tip a dime?

A. Yes, sir.

Q. How about a dollar fare?

A. Well, the majority of dollar fares, you don't get anything. They will hand you a dollar bill.

Q. How about a 30-cent fare?

A. Well, a 30-cent fare, you get usually a dime, once in a while you might get 15 cents.

Q. What percentage of 30 cents is a dime?

A. It would be about $33\frac{1}{3}$, I believe.

Q. What percentage of 30 cents is 15 cents?

A. Almost half.

Q. Did you consider those fares in arriving at your general estimate of what the percentage of gross bookings would be, when 50 per cent of your patrons tip?

A. I didn't get your question, sir?

Q. I mean, Mr. Roberts, did you consider, when you testified on direct examination, that your tips averaged 10 per cent, did you consider that a lot

(Testimony of Harry A. Roberts.)

of your averaged tips 50 per cent or 33⅓ per cent?

A. Yes, I did.

Q. You took that into consideration?

A. Yes, sir.

Q. What is your average fare in town, would you say?

A. Well, really don't know. I would say that the average fare is about 80 cents.

Q. About an 80-cent fare? [36]

A. I would think that would come pretty close to it.

Q. Are a majority of your fares 80 cents?

A. No, I wouldn't say so.

Q. Is there any one fare that you could say constitutes a majority of your fares?

A. No, I couldn't.

Q. They are pretty much split up, is that correct?

A. Yes, sir. Some days you might have all short trips, and the next day all long ones, so you never know.

Q. Do you consider yourself, Mr. Roberts, an average cab driver?

A. Yes, sir.

Q. Do you feel that your tips received over the course of a year are fairly typical of the experience of cab drivers in Los Angeles?

A. Yes, I do, speaking for the others; I couldn't speak for them, but I mean—

Q. Well, I understand that. Now, with respect to the uniform item, how many uniforms have you at the present time? [37]

(Testimony of Harry A. Roberts.)

Q. Did you keep any record of these tips that you received in 1943? A. No, sir.

Mr. Hurley: That is all.

Redirect Examination

By Mr. Howard:

Q. Mr. Roberts, what would you say would be the smallest fare that your taximeter reading would show, and what the maximum fare that your taximeter would show for your trips?

A. The minimum is 30 cents now. It was 20 cents in 1943—I believe it was either 15 or 20, I don't remember which, but there is no maximum.

Q. Well, how large do these taxi fares run at times?

A. Well, you get lots of flat rates at ten, fifteen, or twenty dollars.

Q. Now, in your upper-bracket fares, can you elucidate a little bit on what the tips would be for a \$10.00 job, or a [38] \$5.00 job, or a \$3.00 job, from your experience?

A. Usually you get nothing on those kind of trips. People that ride those kind of trips never give you anything.

Q. Now, in the course of your operating a taxicab, do you convey passengers who do not pay you in cash? A. Yes, sir.

Q. To what extent would you say that exists?

A. Well, we use the Yellow Cab scrip, and there are charge accounts that the Yellow Cab Company has. They have several charge accounts here in the city where we transport their employees—

(Testimony of Harry A. Roberts.)

Q. As, for instance, Mr. Roberts, what—

A. The Telephone Company, for one, transport their employees back and forth from work, and it is strictly a charge account. They sign the meter receipt and that is all you get.

Q. Did you ever get tips where there is a charge account?

A. You never get a tip on a charge account, never.

Q. Did that condition exist in the calendar year 1943? A. Yes, sir.

Q. How about hospitals and doctors?

A. They have lots of charge accounts with the different hospitals, that is, the Southern Pacific Railroad, the Union Pacific, the Santa Fe, where there are several hundred trips [39] each day that are charge accounts to the hospitals that we never get anything on.

Q. Now, taking the smaller bracket, or the moderate bracket trips, let me ask you what is the taxicab fare from here out to Hollywood where I have my office.

A. From downtown here, approximately \$1.80.

Q. Have you frequently made the trips from downtown Los Angeles to Hollywood?

A. I have.

Q. From your recollection, what would you say was the customary tip from those who did tip on that?

A. A dime or 15 cents; once in a while you might get 20 cents.

(Testimony of Harry A. Roberts.)

Mr. Howard: No further questions.

The Court: Anything further.

Mr. Hurley: That is all.

The Court: Let me ask you one or two questions, Mr. Roberts. You spoke about fare, I think you said \$10.00, \$15.00, and \$20.00.

The Witness: Yes, sir.

The Court: Do you mean that no one paying such fares as that ever tip?

The Witness: No, sir, it is usually servicemen going from here to the Harbor, and they don't have the money. It is a rush order and it is someone that rides a taxicab that [40] far who is usually someone that has to get there on short notice and they just don't have the money for tips when they ride trips like that.

The Court: Now, do you mean that none of them—

The Witness: Well, once in a while.

The Court: Well, that is what I wanted to get at.

The Witness: Not all, probably one out of twenty-five.

The Court: That is what I wanted to get at. Is there any system of computing the mileage that you cover in a year or any other period of time?

The Witness: Well, there is a record every night of the mileage we cover, it is on the meter sheet that comes out of the meter.

The Court: The company would have it at the end of the year?

(Testimony of Harry A. Roberts.)

Q. As, for instance, Mr. Roberts, what—

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The Witness: Well, there is a record every night of the mileage we cover, it is on the meter sheet that comes out of the meter.

The Court: The company would have it at the end of the year?

(Testimony of Harry A. Roberts.)

The Witness: Yes, sir.

The Court: Would they furnish that to you?

The Witness: No, sir.

The Court: Then you wouldn't have any record of how many miles you covered in a year?

The Witness: No, sir, it just would be on the daily basis. [41]

* * * *

PHILIP DAVIS,

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, Mr. Witness, please.

The Witness: P. C. Davis, or Philip C. Davis.

Direct Examination

By Mr. Howard:

Q. What is your occupation, Mr. Davis?

A. I am a taxicab driver. [42]

Q. For whom?

A. For the Yellow Cab Company of Los Angeles.

Q. Where?

A. Out of the Beverly Hills area, Beverly Hills garage.

Q. How long have you been a taxicab driver?

A. Twenty-one years.

Q. How long have you been employed by the Yellow Cab Company? A. About 16½ years.

(Testimony of Philip Davis.)

Q. During all of that time in the Los Angeles area? Yes, sir.

Q. Are you also the representative of a group of some three hundred to three hundred fifty taxicab drivers, having to do with income tax matters?

A. I was elected their chairman.

Q. As such, have you acquainted yourself with the problems of this group generally?

A. I have.

Q. As well as the Petitioners herein?

A. I have.

Q. Have you frequently had conferences with the representatives of the Commissioner and the Collector's office of this district? A. I have.

Q. In your 21 years—did I understand you to say as a taxicab driver—have you become familiar with the method [43] of payment of cab drivers?

A. Very much so, sir.

Q. Are you familiar also with what is called the custom of tipping that exists in some instances?

A. I am.

Q. Based upon your observation and experience, can you give us an estimate of the proportion of passengers of taxicabs who tip?

A. That would be, in my opinion, strictly according to district, area, and also whether it be night or day.

Q. Well, break it down and give us your best answer, Mr. Davis.

A. I worked 17 years nights. Naturally, you drive the same people, but maybe under a different

(Testimony of Philip Davis.)

environment. Are we talking about 1943 or years prior?

Q. Relate it to 1943.

A. In 1943 you had gross business that was much more out of proportion than it is at the present time in regard to your number of tips, but what we consider regular cab riders, I would say that approximately 40 or 50 per cent of the people that are in and out of your taxicab give you something.

Q. Now, that something that they give you, from your observation and experience and your relationship with your employer, which I understand has been the same for 21 years, are you permitted to solicit, directly or indirectly, any tips? [44]

A. None whatsoever. In fact, before you get your license the Board of Public Utilities, who govern the taxi drivers in this area in the City of Los Angeles, give you instructions in regard to your procedure while being a cab driver. They imply and stress upon the point that anything beyond the fare will be scorned on or looked down on and your license will be revoked if you attempt to collect anything further, I mean, in a forceful manner or demanding manner.

Q. Do you have similar or identical instructions as to your activities from your employer as to the solicitation of tips?

A. They conform with the Board of Public Utilities, with the addition that you are to assist your passengers in all ways, and that covers a multitude of ways that you—well, they are in your

(Testimony of Philip Davis.)

charge once they enter your car. That is your general instruction.

Q. Is there any service that you render to a passenger which is not covered by the taximeter bill?

A. No, there is none, no charge that can be made for any additional.

Q. Now, I am referring to the carrying of bags and things of that sort. In your understanding or contract with your employer, are you compensated by your employer for such service on your part?

A. You are compensated under the matter of a guarantee [45] or a commission, whichever exceeds, it is just a part of salary and it is expected of you.

Q. Generally speaking, and referring not merely to yourself, but to the organization that you represent, what is the salary basis as of the year 1943?

A. The yearly salary?

Q. No, just the salary basis, what is their wage contract, what do they get?

A. Well, it is run on a seniority basis with the Yellow Cab Company. To start out, I believe at that time, between the first year you were on the rate of 40 per cent or \$6.00 a day, whichever was greater. After serving one year, you automatically went to 42½, which extended for three years, and after three years you were given 45 per cent.

Q. Now, from your experience and your knowledge gained from the members of your organization, what, in your opinion, Mr. Davis, would be a

(Testimony of Philip Davis.)

fair basis, percentage basis, of the fare received from those who do tip?

A. Oh, I don't know. I would more than likely concur to Mr. Roberts' estimate on that, about 10 per cent. It would in this matter. I might make an explanation to that, that you get your ten, occasionally your quarter, on your short trips or on your long trips, but you wouldn't get your 10 per cent proportionately on a two or three dollar trip, basing it on a 50-cent estimate of a dime. [46]

Q. Now, to what extent does this custom of hauling customers on credit exist?

A. Well, there are numerous accounts for the Yellow Cab Company, such as the railroad crews, which were in existence very much in the year 1943, the telephone companies from all their various branches and exchanges, doctors, different automobile exchanges and hospital units. It is according to what area you work out of whether you get those.

Q. Now, you might enlighten the Court and counsel a little bit upon the matter of districts and its relation to tips, whether the tips are received in one district to the same extent as they are in others.

A. Well, you take our Central Avenue district. I will wager to say that if you average two tips out of ten to twelve trips, you are doing good. If you are in the Highland Park district and your East Side district, they are low tipping districts. Your downtown areas at night might be better than days. As you go farther west to the Hollywood area and to the Beverly Hills area, where you have more of

(Testimony of Philip Davis.)

the richer type of people and their homes, maybe you might get a fair return from your individual trip. Of course, that extends out into the North Hollywood area, where tips are very small because the cab business is being introduced to those people. They came from all sections to build that area, and so maybe they weren't accustomed to taxicabs or the habit. [47]

Q. Now, with reference to the credit items that you started to tell us about, do you receive any tips where you haul passengers for the Telephone Company or the hospitals or what not?

A. None whatsoever. In fact, we just recently had a bulletin where evidently it must have been new drivers that expressed their personal feelings toward hauling these trips, and they were somewhat berated by the company, that they had no right to expect anything beyond that, and that is a recent bulletin. Of course, old-timers know that.

Q. You consider yourself an old-timer?

A. Well, fairly.

Q. Now, with reference to bulletins, you heard Mr. Roberts' testimony as to his having been contacted in this instance, requested to file an amended return to include tips, and I take it you are familiar with the score or so of others in the same category?

A. Yes. To my knowledge, the first notices that were sent out were sent out in the Hollywood area and sent out for the years of '43 and '44. Delinquent or amended returns were to be made for that,

(Testimony of Philip Davis.)

and it was started the first week of September, 1943. That was the first knowledge we had.

Q. After you received that knowledge, did you advise members of your organization to keep a daily record of tips after that? [48]

A. Well, not at that specific date, because we had a representative of the Government come down and answer questions in regard to what it was. Everyone didn't understand it, even though you had been with the company a number of years and driven a taxicab all that time, and after that it was through that method that I became chairman of this group of men which amounted to approximately—well, I became representative of that group which amounted to around 700 men that gave the amount of moneys that were raised to try this case, or test it.

Q. After that had occurred, you therefore did advise them to keep their daily records, is that right?

A. I advised them on numerous occasions to always keep a daily record.

Q. Now, you also consulted on behalf of these men, including the Petitioners, counsel for the purpose of determining counsel's opinion as to whether tips were taxable or not, did you not?

A. I did.

Q. Were you advised on behalf of your organization that in the opinion of counsel that tips constituted gifts and were not taxable income?

A. I was. [49].

(Testimony of Philip Davis.)

Q. Taking the typical instance that I cited to Mr. Roberts, say, of a trip from here to my office—you know where my office is—what, in your opinion, would be, from one who tipped, the usual tip for that \$1.80 fare? [50]

A. Well, one who tips—in my estimation, it is wide open. A man might constitute—you don't usually get less than a dime, and you might get 20 cents or occasionally a quarter.

Mr. Howard: That is all. You may cross-examine.

Cross-Examination

By Mr. Hurley:

Q. Mr. Davis, have you kept actual records of the tips that you received?

A. No, I haven't, other than in keeping a daily record since I was informed to do so.

Q. You did not keep a record during the year 1943? A. Not prior to that, no.

Q. Was the year 1943, so far as tips were concerned, an average year, a better than average year, or not quite average?

A. Well, it was a better than average.

Mr. Hurley: That is all.

Mr. Howard: No further questions.

By the Court:

Q. Let me ask you this, Mr. Witness: You said, a moment or two ago, that you rarely got less than a dime, or something to that effect. I want you to tell me whether you mean by that, regardless of

(Testimony of Philip Davis.)

how much the fare is, at that time you were talking about a \$1.80 fare, I believe, but what I want to know is whether it is true or not true that you rarely get less than [51] a dime, assuming that you get anything.

A. That is right, sir, you hardly get a tip less than a dime, although you do have exceptions to that where you will get a nickel.

Q. I want to ask you a question about these long, expensive trips, \$5.00, \$10.00, or \$20.00. You have heard the testimony in that regard?

A. Yes, sir.

Q. What would you say, about what percentage of such patrons tipped you and how much?

A. Well, the \$15.00 and \$20.00 trips, sir?

Q. Yes.

A. Well, that all depends on the individual, sir.

Q. Give us your best judgment as to what percentage of them would tip.

A. Well, I would say they are less than the average regular run.

Q. What per cent would they tip?

A. Well, I imagine 25 to 50 cents at the most. There will be exceptions to that, but that would be the average, sir.

Q. In the course of a year, back in 1943, there might be a difference because of war conditions then, so we will not talk about now. In the course of a year, what would you say as to how many

(Testimony of Philip Davis.)

\$10.00 patrons the ordinary taxicab driver would be likely to have? [52]

A. Oh, working days, I imagine they would be shorter than they would be at nights. The reason why I state that is because transportation, as you know, in 1943 was somewhat jammed up, and even at its best it was crowded. People did have access and time in daylight to make these out-of-the-way trips though we were restricted mostly to our confined areas during those times, and the only exceptions made to that were for emergencies like railroad trips or sicknesses or something of that type. We had instructions by the Government bureaus that handled transportation to restrain us to our Los Angeles area.

Q. Well, that gives me a general idea, but it still doesn't answer my question. In 1943 what would be your best idea as to how many \$10.00 fares in the course of a year the ordinary taxi driver here in Los Angeles would have?

A. Oh, I wouldn't estimate more than one a month.

Q. One a month. \$5.00 fares?

A. Well, it may be, five, six, or seven a month.

Q. Would it be more at night than it would be during the day?

A. Yes, it would, though that doesn't stand to be absolutely true if you might have all your trips in the daytime and wouldn't get any at night, that wouldn't exceed that much, but that is the average.

(Testimony of Philip Davis.)

The reason I make that, was on account of the statement of transportation being at a [53] premium at that time.

Q. You told about the percentage of take that you received, or an ordinary taxi driver would receive, from the company in 1943, and you went up to 45 per cent. I am not clear as to whether that is the top.

A. That is the top, was the top at that time. That was the top, and the required seniority and the number of years in order to get that, sir.

Q. Well, now, in 1943 there was gasoline rationing, was there not? A. Yes, sir.

Q. Did that increase the number of taxi patrons? A. Very much so, about trebled it.

The Court: I believe that is all I want to ask.
By Mr. Hurley:

Q. I wasn't quite clear, Mr. Davis, on the statement that you made about being restricted to the Los Angeles area.

A. We were restricted to the area. I don't know what the ABC classification of it by a transportation unit of the Government was.

Q. That is during the taxable year 1943?

A. Yes. That restrained us from leaving the city limits of Los Angeles with the exception of emergencies.

Q. Well, in other words, these \$15.00 or \$20.00 trips weren't very common, or, in fact, were impossible except for [54] emergencies?

(Testimony of Philip Davis.)

A. Except for railroads and sickness, or something of that type, where we had specific reasons to go beyond those limits.

Mr. Hurley: That is all.

Redirect Examination

By Mr. Howard:

Q. Let me ask you this one question: Within the City of Los Angeles, what would be the maximum fare within the city limits from one end of the city limits to the other?

A. Well, it is 44 miles long, and we have a license to cover that entire area. The trip from Los Angeles to the San Pedro area runs around \$8.00.

Mr. Howard: That is all.

The Court: You are excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Howard: May I ask counsel—we have had some conferences relative to this matter—whether counsel is willing to stipulate that the other witnesses, well, some score or more that we indicated that we could produce, who are members of this organization that Mr. Davis told you about, if they were called to the stand, if counsel would stipulate that their testimony substantially along the general lines, and not, of course, pertaining particularly to the amounts of Mr. [55] Roberts' complaint or the allegations supporting the same, if he will stipulate that their testimony will be substantially the same?

Mr. Hurley: If the Court please, I couldn't

very well stipulate any such thing, nor have I ever agreed to stipulate such a thing. These witnesses have testified concerning the very issue in the case, and to stipulate that some three hundred or so cab drivers who are themselves partisans in this case would testify the same way, I would be perfectly willing to try the case for a week before I would stipulate to that.

However, Mr. Howard did question of me to stipulate one thing concerning the testimony, which I am perfectly willing to do, and that is, your Honor, I am perfectly willing to stipulate that the Collector has in the instance of each of these several hundred drivers issued notices of deficiency in cases where it was required, or what was oftener the case, merely requested an amended return upon the same basis, namely, 10 per cent. That was what Mr. Howard was interested in, as I understood him when we had pre-trial discussions. He was interested in making it unnecessary to bring in a group of drivers to testify that the Collector had gone down the line in each case and set each of these taxpayers up upon the same basis. I am perfectly willing to concede that fact. In fact, it is common knowledge that that is the way it is. I obviously couldn't stipulate the weight of the testimony of 350 witnesses who would come in and testify to the same thing. As a matter of fact, if I didn't have witnesses to the contrary, I could have cross-examined indefinitely certain of the testimony that has been on the stand already.

Mr. Howard: If the Court please, I do not engage in controversies with counsel at the counsel table as to any verbal arrangement for stipulation. I merely state that my recollection of our discussion was much different. The particular matters that I am concerned with are not those that relate to the precise amount of the deficiency insofar as Mr. Roberts is concerned, but I believe that each one of some twenty-odd witnesses will testify substantially the same as Mr. Davis and the Petitioner, as to the amount of tips, the proportion of tippers among the passengers, and what they consider to be a fair percentage of the gross amount that they would receive from the persons who tip. I believe that these gentlemen will also testify in support of the testimony of Mr. Davis and Mr. Roberts that they were forbidden to solicit tips and that all of the services rendered by a taxicab driver were included within their wages. Those are chiefly the only items that I would like to introduce further testimony on, in view of counsel's refusal to so stipulate. Your Honor might consider it cumulative, but we are in that position.

The Court: I will say now that I am not going to listen [57] to 20 cumulative witnesses.

Mr. Hurley: I wish to say this, that insofar as taxicab drivers being forbidden to solicit tips, I am willing to stipulate to that. I am willing to stipulate further that all the services are included in the fare, but obviously I couldn't stipulate that the conclusion, the very issue in the case, namely, would

be fair estimate of the tips or would be corroborated by several hundred witnesses any more than I would expect counsel to take the testimony of my witnesses on the same issue and stipulate that I could go out and get another hundred witnesses to testify to the same effect.

I am willing to stipulate to what are obviously facts, but I am certainly not willing to stipulate to the very issue in the case.

Mr. Howard: We will accept the stipulation as presently stated by counsel.

The Court: That settles that.

What says the Petitioner?

Mr. Howard: I believe under that situation, if your Honor please, the Petitioner now respectfully rests.

The Court: Petitioners rest, what says the Respondent?

Mr. Hurley: I have several witnesses, your Honor.

The Court: If you have several witnesses, we are not going to finish this matter this evening.

Mr. Hurley: If your Honor please, as far as my direct examination is concerned, I intend to expedite it as rapidly as possible. I don't know about counsel's cross-examination.

Mr. Richardson.

Whereupon,

ORVILLE RICHARDSON

called as a witness for and on behalf of the Re-

(Testimony of Orville Richardson.)

spondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, please.

The Witness: Orville Richardson.

Direct Examination

By Mr. Hurley:

Q. Mr. Richardson, what is your present occupation?

A. Personnel director of the Yellow Cab Company of Los Angeles.

Q. How long have you held that position?

A. For 13 months, the last 13 months.

Q. What was your position before that time?

A. Previously I was a traffic superintendent and a starter, and before that a taxicab driver.

Q. What years were you driving a taxicab in Los Angeles?

A. In '41, '42, '43 and part of '46 when I came back from the Army. [59]

Q. During that time, Mr. Richardson, did you keep actual records of the tips received from patrons?

A. I did.

Q. Can you tell us from your records what those tips averaged in terms of ratio of tips to gross bookings?

A. Oh, they would average straight through at least 10 per cent through the year.

Q. Would you say that a 10 per cent average of tips to gross bookings is a conservative average of the tips received by the average cab driver who

(Testimony of Orville Richardson.)

drives a Yellow Cab? A. Yes, I would.

* * * *

Cross-Examination

By Mr. Howard:

Q. Just one or two questions, Mr. Richardson.
You are presently personnel director?

A. That is right.

Q. When did you quit driving a cab?

A. In July of 1946.

Q. Where were you employed in the year 1943?

A. I was employed for the first month in 1943
as a driver with the Yellow Cab Company.

Q. After that you did not drive during the year
1943?

A. I was in the Army for the three years after
that.

Mr. Howard: No further questions.

Redirect Examination

By Mr. Hurley:

Q. On further question, Mr. Richardson. Does
that estimate that you gave and your records on
the tips received cover 1941, 1942 and that portion
of 1943 that you worked for the Yellow Cab Com-
pany as a cab driver?

A. That is true, they do.

Q. Is that correct? A. Yes. [61]

* * * *

LLOYD E. BRYSON

called as a witness for and on behalf of the Re-
spondent, having been first duly sworn, was ex-
amined and testified as follows:

(Testimony of Lloyd E. Bryson.)

The Clerk: Will you tell us your name, Mr. Witness, please?

The Witness: Lloyd E. Bryson.

Direct Examination

By Mr. Hurley:

Q. Mr. Bryson, what is your occupation at the present time?

A. I am a cab driver for the Yellow Cab Company of Los Angeles.

Q. How long have you been a driver for the Yellow Cab Company?

A. For the Yellow Cab Company direct about 13 years.

Q. Would you speak a little louder so the Court can hear you?

A. About 13 years for the Yellow Cab Company directly.

Q. How long have you been driving a cab? [62]

A. A little over 17 years in all.

Q. Were you subpoenaed to appear and testify in this proceeding on behalf of the government?

A. I was, sir.

Q. Were you employed as a cab driver by the Yellow Cab Company in Los Angeles in 1943?

A. I was.

The Court: What year did you say?

Mr. Hurley: 1943.

The Court: I thought you said 1944. Proceed.

By Mr. Hurley:

Q. From your 17 years experience as a cab

(Testimony of Lloyd E. Bryson.)

driver, are you familiar with the tipping habits of the general public so far as taxicab drivers are concerned? A. I am.

Q. What was the answer?

A. I am, yes, sir.

Q. Is it a custom among patrons to tip?

Mr. Howard: Now, we object to that question even on the grounds of expedition.

Mr. Hurley: I think the question is perfectly proper.

Mr. Howard: It calls for a conclusion of the witness.

The Court: The objection is overruled. You can always prove custom. [63]

The Witness: Is it customary for a certain per cent, yes.

By Mr. Hurley:

Q. Do most patrons tip?

A. I would say approximately 50 per cent.

Q. Mr. Bryson, when we discussed the matter prior to the trial of this proceeding, did you tell me that it was—you can answer this question yes or no—did you tell me that it was customary to tip, and as a matter of fact, “Most people would feel like a heel,” to quote you, “if they did not.”

Mr. Howard: Now, if the Court please, we don’t believe that counsel should cross-examine his own witness.

Mr. Hurley: I am not trying to impeach the

(Testimony of Lloyd E. Bryson.)

witness, I am trying to refresh his memory. A great deal has apparently happened.

The Court: Yes, you can cross-examine the witness if you are surprised by the witness.

Mr. Hurley: I am indeed, your Honor. I discussed the matter with him in the hall not more than an hour and a half ago.

The Court: Answer the question if you can. The objection is overruled.

The Witness: There are personal reasons there.

The Court: What is that? [64]

The Witness: It would be in personal cases. The average person, I would say, tips because it is a custom.

By Mr. Hurley:

Q. All right. Mr. Bryson, what do you consider a fair and reasonable estimate of the percentage of tips to gross bookings received by Yellow Cab drivers over the period of a year, and particularly with reference to the year 1943?

A. Well, I would say that the 10 per cent is a fair average.

Mr. Hurley: That is all.

Cross-Examination

By Mr. Howard:

Q. Now, Mr. Bryson, in arriving at your 10 per cent, are you computing that upon the amount of the tips received from the persons who do tip or are you computing it upon the total amount of your bookings? Which is it?

(Testimony of Lloyd E. Bryson.)

A. I was computing that on the total amount of bookings.

Q. Now, you first testified, I believe, in answer to counsel's question, that only approximately 50 per cent of the people tipped. Is that still your testimony?

A. I think that is about a fair estimate.

Mr. Howard: That is all.

Redirect Examination

By Mr. Hurley:

Q. Mr. Bryson, are you correcting the testimony that [65] you gave, namely, that it was customary with most people to tip, or are you reverting to the original statement that you made? If you recall, I attempted to refresh your mind on what you had originally told me was your opinion on this matter, and it was my understanding that upon refreshing your mind you changed your testimony to agree with your original statement to me out of this court, that it was customary from the standpoint of the public to tip, and that you said the average person tips, as I understand it. Is that your testimony? Now, are you changing your statement again or just where do you stand on this?

A. What I was trying to convey is that we were discussing why people tipped, and I said that most people will tip because it is customary to do so.

Q. Does the average person tip in the sense that—do a majority of people that enter your cab tip you?

(Testimony of Lloyd E. Bryson.)

A. I would say perhaps it would run a little bit better than 50 per cent.

Mr. Hurley: That is all.

Mr. Howard: That is all.

The Court: You are excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Hurley: Mr. Herbert C. Hendry, please.

The Court: I am not going to allow you to [66] accumulate this too far.

Mr. Hurley: This is the last witness.
Whereupon,

HERBERT C. HENDRY,

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, Mr. Witness, please.

The Witness: Herbert C. Hendry.

Direct Examination

By Mr. Hurley:

Q. Mr. Hendry, what is your occupation?

A. Taxicab driver with the Yellow Cab Company of Los Angeles.

Q. How long have you been a Yellow cab driver?

A. Going on 16 years.

Q. Have you been driving cabs in Los Angeles for that time? A. I have. [67]

* * * *

(Testimony of Herbert C. Hendry.)

Q. Were you subpoenaed, Mr. Hendry, to appear in this proceeding to testify in behalf of the government? A. I was, sir.

Q. From your experience as a cab driver in Los Angeles, what do you consider a fair and reasonable estimate of the percentage of tips to gross bookings received by Yellow Cab drivers averaged over a period of a year, particularly with respect to the year 1943?

A. Well, that 10 per cent of the bookings is a very reasonable amount, that is, figuring about 50 per cent of the people—it is a pretty good average, too—for the tipping public. [68]

Mr. Hurley: That is all.

Cross Examination

By Mr. Howard:

Q. You said figuring about 50 per cent of the people tipped? A. About that.

Q. That is your best estimate as to the number of people?

A. Well, that is a pretty good average for the year. That is not the average every day, though.

Q. On this 10 per cent, are you considering solely the people that tip as being 10 per cent as a fair basis?

A. True. 50 per cent, I would say, of the people I haul in a year.

Q. Tip? A. That is a fair basis.

Q. Now, do you mean that the 10 per cent of this fare would be the usual tip?

A. 10 per cent of our gross bookings would be, yes.

(Testimony of Herbert C. Hendry.)

Q. In other words—

A. That would be fair.

Q. If only 50 per cent of the people tipped, then, your testimony is that you would get 20 per cent of your fare per tip?

A. No, I say in 1943 tht 10 per cent would be a fair [69] gross—that is, fair. I didn't say that it would be more, I said that it would be fair. That is what you asked me.

Mr. Howard: That is all.

Mr. Hurley: I want to clear this testimony up, if your Honor please, for a moment.

Redirect Examination

By Mr. Hurley:

Q. In other words, Mr. Hendry, if you take your gross bookings for the whole year after all the people you took and you took a figure of 10 per cent of that regardless of who tipped you and who didn't, just the total of your gross bookings, would 10 per cent of that figure be a fair and reasonable amount of the tips you received?

A. In my case it would.

Q. Would you say it was a fair estimate for the average cab driver?

A. I wouldn't say for the average cab driver since there are so many things stipulate to whether a cab driver gets a tip.

Q. Well, I mean—

A. But in my case I would say it would be, it is a fair estimate.

Q. Are you familiar with what the average

(Testimony of Herbert C. Hendry.)

driver receives in tips? Don't you frequently compare tips with each other? [70]

A. Well, I don't. I never talk about tips, but 10—I imagine, I would say would be, in my estimation—would be for the average cab driver.

Q. But, in other words, you don't know that another cab driver from yourself receives less?

A. I never pay any attention to any other man.

Recross Examination

By Mr. Howard:

Q. You are basing your testimony solely upon your personal experience?

A. That is all I could base it on.

Q. You have no further knowledge aside from your own estimate as to your position?

A. I do not.

Mr. Howard: That is all.

By the Court:

Q. Let me ask you this, Mr. Witness: There has been some testimony here about it being the tipping manner, and perhaps the amount of fares being different in different districts. I believe Hollywood has been mentioned and some other districts, which I assume were meant to be very poor districts. Now, let me ask you this: Do you cover all of these districts, or did you in 1943, or were you limited to one district?

A. In 1943, yes, we were—once we were at Beverly [71] Hills alone, but then the place was opened up and we worked all these districts, combined. Now, in 1943 I am not sure whether we did or not, but

(Testimony of Herbert C. Hendry.)

we were permitted to pick up anywhere where we had our licenses, and I am familiar with these districts. Central Avenue is one.

Q. What I am interested in is whether during 1943 you covered the city generally or were limited to some particular kind of a district, poor or rich?

A. Mostly in Beverly Hills.

Q. Mostly in Beverly Hills? A. Yes.

The Court: I believe that is all I want to ask.

Mr. Hurley: May I ask the witness one further question?

The Court: Yes.

Redirect Examination

By Mr. Hurley:

Q. The testimony that you gave concerning the percentage of tips, what was a fair estimate in your case. Does that apply for other years besides 1943? Is that a general estimate, from your experience?

A. Well, I wouldn't be able to say for the present time, but I imagine it would be—of the entire year, I imagine, at the present time it would be a little more than what you actually do get, because you see, the point [72] today is that we don't have the regular cab riders. We carry many people, servants, and as a rule as was once before stipulated, you get down to the Central Avenue district, you get down to the colored district, and some of them do, but the average time you don't get a tip out of them unless they know you.

Q. Mr. Hendry, so far as your testimony is concerned, and in response to my question as to what

(Testimony of Herbert C. Hendry.)

is a fair estimate over a year's period of the tips to gross bookings, is that estimate that you gave an estimate applicable, in your experience, to all or most all of the years that you have worked, or have you confined that to 1943?

A. That is what I thought you were speaking of, 1943. Before the war broke out, we were—our bookings—we were lucky if we booked \$10,00 a day.

Q. I am not speaking of the bookings, I am speaking of the average tips in relation to the bookings.

A. In relation to the bookings, yes.

Q. What in relation to the bookings?

A. The 10 per cent to the amount of our bookings.

Q. Was that fair? A. Sure.

Q. In other words, this ratio of 10 per cent to gross bookings is a ratio which was fair to other years prior and subsequent to 1943, is that correct?

A. Yes, sir.

Mr. Hurley: That is all.

Recross Examination

By Mr. Howard:

Q. You have related your personal idea as to the fair tips as relates to bookings based upon your own personal experience as a cab driver in the year 1943, and I believe—

Mr. Hurley: I think that is incorrect. I think that the witness' testimony is that that is his experience for all years, or substantially all. In other words, over his cab driving career.

(Testimony of Herbert C. Hendry.)

Mr. Howard: Well, if you will let me correct the question, counsel.

Mr. Hurley. You can't finish a question by making a misstatement.

The Court: Finish the question.

Mr. Howard: I will rephrase the question.

By Mr. Howard:

Q. Based upon your personal experience, disregarding your opinion as to the other years, that is, related just to the year 1943, you arrived at the estimate as to your personal experience as a cab driver that 10 per cent of bookings was fair, that is right, isn't it? A. Yes, sir.

Q. Now, I will ask you if in that year you did not work [74] out of the richest district in Los Angeles.

A. The richest district in Los Angeles doesn't give as much as poor districts individually.

Q. But did you or did you not work out of the Beverly Hills district? A. Not continuously.

Q. Most of the time you were out of the Beverly Hills garage?

A. You see, I worked day work, and most of our day work is from home to bus down to the depot, down to the bus line, down to the store, taking the children to school and those kinds of trips you hardly ever get a tip, and from the street car back up to Hills again.

Q. Did you ever work out of Boyle Heights in the year 1943?

A. Once in a while I pick up a load.

(Testimony of Herbert C. Hendry.)

Q. The Central Avenue district?

A. Not continuously. As I say, if I loaded down there, I would on my way back pick up a load on the way out.

Q. As I understand it, you boys work out of a certain garage, is that right?

A. That is right.

Q. In the year 1943 you were assigned most of the time to the Beverly Hills garage, is that correct?

A. I still am a Beverly Hills detail. [75]

Q. And in 1943 you were? A. Yes, sir.

Mr. Howard: That is all.

Mr. Hurley: If your Honor please, I am sorry to prolong this a little further.

Redirect Examination

By Mr. Hurley:

Q. Mr. Hendry, the testimony that you gave concerning what is a fair and reasonable estimate from your experience as a cab driver, does that apply to the years that you have been a cab driver, which I believed you testified is some 17, is that correct?

A. Going on 16.

Q. All right, 16 years. Does that apply to those years and for the City of Los Angeles and not confined to Beverly Hills?

A. Well, I would—on a run of a year, I would say yes.

Q. In other words, the 10 per cent so far as the year 1943 is concerned is a very conservative estimate, is it not? A. I think so.

(Testimony of Herbert C. Hendry.)

Q. In other words, if you actually figured it up, it would be higher than 10 per cent?

The Court: This is your own witness.

Mr. Hurley: He has agreed with me, your Honor. I am trying to speed this up. I appreciate the fact that it is [76] the rapidity with which I was placing the question was not with the idea of impeaching the witness, but so as to conclude the hearing as expeditiously as possible. He has agreed with me, so that I have no further questions at this time.

The Court: Let me ask you this, Mr. Witness, one more question: 1943 was during the war, as I can take judicial notice of, of course, now tell me whether or not during that war time period tipping was more liberal or less liberal than ordinarily.

The Witness: It was more liberal because people—it was hard to get taxicabs and when a person got it, he was very pleased with the service, the fact that he could get a cab, so in my estimation it was more. Some people, of course, aren't the tipping kind, of course, but, of course, they never tip.

The Court: That is all I want to ask.

Mr. Howard: I have no further questions.

The Court: You are excused, Mr. Witness.

(Witness excused.)

Mr. Hurley: Respondent rests.

The Court: Respondent rests, what says the Petitioners?

Mr. Howard: The Petitioners rest. I have just one rebuttal witness. Mr. Davis, please.

(Testimony of Herbert C. Hendry.)

The Court: In stating that I wouldn't listen to 20 [77] witnesses accumulate, I didn't intend to limit you to two witnesses, counsel for the Petitioners.

Mr. Howard: I understand that.

Whereupon,

PHILIP DAVIS,

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Howard:

* * * *

Q. You heard the testimony of the last witness on the stand, Mr. Davis, as to his opinion as to a fair proportion [78] of gross bookings and tips. What garage do you work out of?

A. The Beverly Hills garage.

Q. How long have you worked out of that?

A. Oh, about two and one-half years.

Q. Had you previously worked out of there in the year 1943?

A. They didn't have a garage before that. I worked out of the Hollywood and Beverly Hills garage. I mean, the Hollywood garage covered the Beverly Hills and the Hollywood area.

Q. How would you contrast or compare the tips received by an individual cab driver working out of Beverly Hills with other districts in this area?

A. Approximately 25 or 30 per cent more.

[Endorsed]:Filed Dec. 30, 1947. [79]

[Title of Tax Court and Cause.]

REVISED DESIGNATION OF CONTENTS OF
RECORD ON REVIEW

To: The Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review heretofore filed by Harry A. Roberts and Ruth M. Roberts:

(1) The docket entries of all proceedings before the Tax Court.

(2) Pleadings before the Tax Court, as follows:
(a) Petition; (b) Answer; (c) Petitioners' reply (not of record).

(3) The findings of fact and opinion of the Tax Court.

(4) The decision of the Tax Court.

(5) The petition for review.

(6) The testimony of the witnesses, beginning on line 20, page 8, and ending on line 14, page 68 [80] of official report of proceedings at Los Angeles, California, on December 12, 1947, but excluding therefrom the following: Line 14, page 13, to and including line 14, page 17; line 20, Tr. 21, to and including line 8, Tr. 23; the last two lines of page 26, all of page 27, and the first fifteen lines of page 28; the last two lines of page 35 and the first 21 lines of page 36; lines 12 through 25, page

46; the last four lines of page 47, all of pages 48, 49 and 50, and the first five lines of page 51; the last six lines of page 56 and the first 13 lines of page 57; lines 11 through 23, page 67.

(7) This designation of contents of record on review.

GILBERT J. HEYFRON,
EARL E. HOWARD,
Attorneys for Petitioners.

Agreed to:

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Attor-
ney for Respondent.

[Endorsed]: Filed July 15, 1948. [81]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 81, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 21st day of July, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11999. United States Court of Appeals for the Ninth Circuit. Harry A. Roberts and Ruth M. Roberts, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 29, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 11999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY A. ROBERTS and RUTH M. ROBERTS,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' BRIEF.

FILED

SEP 26 1948

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CLECK

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No. 11999

IN THE

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FOR THE NINTH CIRCUIT

HARRY A. ROBERTS and RUTH M. ROBERTS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF.

Statement of Pleadings and Facts.

Petitioners allege:

1. That tips received by taxicab drivers are of the nature of gifts or gratuities and not taxable income.
2. That an arbitrary assessment of ten per cent of gross bookings of taxicab fare is unreasonable and cannot be supported under the evidence.

The answer consists largely of a general denial.

Decision was rendered by the Tax Court in favor of the Respondent.

Petitioners ask a review of such decision under the provisions of Section 1141-2 Internal Revenue Code.

Statement of the Case.

Harry A. Roberts, petitioner, a taxicab driver for the Yellow Cab Company in the year 1943, was notified by the Treasury Department under date of May 29, 1946, that his return for the taxable year 1943 showed a deficiency of \$144.34, based upon an addition to his reported income of the amount of \$661.94, representing tips which the Department asserts were received by him and which he failed to report in his return [Tr. 6]. The statement disclosed that his wages had been increased in the amount of \$661.94 arbitrarily by the Department, the basis of said increase being ten per cent of the gross bookings of said Petitioner during said taxable year.

The petitioner during such year had kept no record of tips received by him [Tr. 24] admits that he received tips from his patrons from time to time [Tr. 24]; testified that only approximately fifty per cent of his patrons tipped at all and that in his opinion ten per cent of the fare received from those who did tip would be a fair estimate [Tr. 25].

The petitioner further testified that he rendered no services that were not comprehended within the fare as disclosed by the taxi-meter slip [Tr. 26], and that he had been advised by counsel that tips were not a part of his taxable income and accordingly [Tr. 24], the petitioner refused to pay the amount of the additional assessment.

Petitioner further testified that the basis of his employment was forty-five per cent of the "take," or Six Dollars

a day, which ever was greater [Tr. 27]. His testimony with reference to the size of the tips received from the passengers who do tip is as follows:

“ . . . for a 50-cent fare the usual “tip” was a dime [Tr. 27], on an 80-cent fare the usual “tip” was a dime [Tr. 29], on a dollar fare usually nothing [Tr. 29], on a 30-cent fare ten to fifteen cents [Tr. 29], on a \$1.80 fare ten to fifteen to twenty cents [Tr. 32], and on the \$10.00, \$5.00 or \$3.00 fare usually nothing; on charge accounts such as telephone companies, hospitals, Southern Pacific and Union Pacific Railroads and others, nothing [Tr. 32]; as to \$10.00, \$15.00 and \$20.00 trips, probably one person out of twenty-five ‘tips’ ” [Tr. 33].

P. C. Davis testified as follows:

“That he had been employed in the Los Angeles area as a cab driver for the Yellow Cab Company for sixteen and one-half years [Tr. 34]; that he is the Chairman of a group of approximately 700 cab drivers [Tr. 40] and in such capacity was fully conversant with the problems involved here, namely the cab driver’s relationship to his employer, the alleged ‘custom of tipping,’ the conditions obtaining in the Los Angeles area in 1943 and other years, the proportion of passengers who ‘tipped.’ In other words, Mr. Davis’s statement of fact and opinion reflected a general study, at least to the extent of his observation and experience with seven hundred cab drivers, which summarily is as follows [Tr. 35-39]:

That 40 to 50 per cent of cab passengers ‘tip’ [Tr. 36]; that no solicitation of tips is permitted by the employer or by the Board of Public Utilities [Tr. 36]; that there is no service rendered to a passenger not covered by the taximeter bill [Tr. 37]; that the

compensation of cab drivers is 40 to 45 per cent (depending upon seniority) of his bookings or \$6.00 a day, whichever is the greater [Tr. 37]; that the amount of 'tip' is about 10 per cent of the fare of those who do 'tip' on an average [Tr. 38], and no tips whatever on charge accounts, which were numerous in the year 1943 [Tr. 39]; that on big trips, \$5.00 to \$20.00, those who did 'tip' would 'tip' less than the average, and pay at most 25¢ to 50¢ [Tr. 42] that he estimated the average cab driver would have one \$10.00 trip per month and five or six \$5.00 trips per month [Tr. 43].

The witness Davis further testified that after the government began demanding amended returns, he advised his group to keep a daily record; that on behalf of his organization he consulted counsel and received advice that in the opinion of counsel 'tips' constituted gifts and were not taxable income" [Tr. 40].

The Respondent's witnesses gave the following testimony:

"Orville Richardson, who worked as a cab driver in 1941 and 1942 and only one month in 1943 [Tr. 50] upon solely his personal record of 'tips' received by him, testified such 'tips' would average 10 per cent of bookings throughout the year; gave his opinion that such basis was conservative as relating to the average cab driver [Tr. 49].

"Respondent's witness, Lloyd E. Bryson, testified that it is a *custom* for a certain per cent of patrons to 'tip' [Tr. 52]; that approximately 50 per cent of patrons 'tip'; that the average person 'tips' because it is a 'custom' [Tr. 53] and on cross-examination testified that perhaps a little better than 50 per cent of the patrons 'tipped' " [Tr. 54].

“Herbert C. Hendrey testified that 50 per cent of his passengers ‘tip’; that 10 per cent of gross ‘take’ in 1943 in his opinion is fair; a fair estimate in his case [Tr. 56-57]; that he would not say as to the average cab driver ‘since there are so many things stipulate as to whether a cab driver gets a ‘tip’ ” [Tr. 57]; that he never compared his ‘tips’ with other cab drivers and that he based his testimony solely upon his personal experience [Tr. 61], and that in 1943 he worked mostly in Beverly Hills” [Tr. 61].

In order to avoid the calling of many cab driver witnesses, respondent’s counsel stipulated as follows:

“The Court: I will say now that I am not going to listen (57) to 20 cumulative witnesses.

“Mr. Hurley: I wish to say this, that in so far as taxicab drivers being forbidden to solicit tips, I am willing to stipulate to that. *I am willing to stipulate further that all the services are included in the fare,*” (Italics supplied.)

“Mr. Howard: We will accept the stipulation as presently stated by counsel.

“The Court: That settles that.” [Tr. 47-48.]

Specifications of Error.

(1) Error in determining that petitioner’s tips were taxable income in that they constituted compensation for services.

(2) The failure of the Court to determine that the rule of thumb of 10 per cent of gross “take” applied by the Commissioner by reason of the alleged failure of the taxpayers to keep adequate records, is arbitrary and unreasonable and is not supported by the great preponderance of the evidence.

ARGUMENT.

I.

An Arbitrary Assessment of 10 Per Cent of Gross Bookings as Constituting the Amount of Tips Received by Taxicab Drivers Is Unreasonable and Not Supported by the Evidence.

Under the evidence, without conflict, it appears that not all, but only approximately 50 per cent of taxicab patrons tip at all.

As to whether 10 per cent of gross bookings is fair, there is conflict. We submit, however, that the evidence preponderates greatly in support of petitioner's contention that should a rule of thumb be used, 10 per cent of the fare of those who do tip rather than 10 per cent of the gross "take" is the more reasonable.

Witness Roberts testified that he considered 10 per cent fair from those who did tip, since 10 per cent of 50 per cent [Tr. 26] is the average tip. The witness Davis, upon his own experience of sixteen and one-half years, and reflecting the opinion of an organization of seven hundred cab drivers, testified substantially the same [Tr. 38].

What is the respondent's evidence to the contrary? Orville Richardson testified that the tips would average at least 10 per cent of gross bookings throughout the year, based upon his purported personal records which were not produced [Tr. 49]. However, on cross-examination, he admitted that he worked only one month in the year 1943 [Tr. 50] so he could not have had records for the full year, thus his evidence is largely surmise as to 1943.

Respondent's witness, Monahan, was not queried on this issue. Respondent's witness, Bryson, gave 10 per cent of gross bookings as his estimate [Tr. 54]. Respondent's witness Hendrey (as to his experience only and not the average driver) opined that 10 per cent of bookings was fair [Tr. 57]; that he had no knowledge of other drivers' tips [Tr. 58] and worked chiefly out of the Beverly Hills office [Tr. 61].

P. C. Davis in such respect, however, testified that as to tips received by a driver working out of Beverly Hills, his tips would be approximately 25 to 30 per cent more than in other districts [Tr. 64].

Since it is undisputed that only 50 per cent of patrons tip, such arbitrary assessment would mean that the average tip received by the driver averages 20 per cent of the fare.

The *Cessaneli* case (8 P. C. 85), relied upon by the respondent in the trial court, wherein the Court held that an arbitrary assessment of 10 per cent of sales was justifiable under the evidence in such case, has little pertinency here.

The situation as to waiters may not automatically be extended to cover all vocations. Every day experience demonstrates that tipping of waiters exists to a much greater degree than tipping of cab drivers. A waiter can and oft times does render services not included in the bill—the extra glass of water, perhaps a clean cloth, a refill of one's coffee cup, help with one's coat at the conclusion of the meal and in a score of other respects. All that the taxicab driver does is to permit one to enter the vehicle, transport him to his destination and carry his bags, if any, all of which he is obligated to do for his employer and for which his employer pays him.

It is fundamental that an arbitrary assessment must be in consonance with reason. Since the Department made no effort prior to the year 1943 to require the inclusion of tips as income, we submit that a 10 per cent of gross bookings assessment by reason of the failure to keep records not previously required, is punitive.

II.

Tips Received by a Taxicab Driver Do Not Constitute Any Part of His Wages or Compensation for Services, but in Truth and Fact Are Gifts and Therefore Not Taxable Income.

The letter and spirit of the Income Tax Act is to impose a tax upon income and not upon gifts, unless the money allegedly "given" is in essence compensation for services.

The word "tip" or "tips" is not used in the Act itself; however, Regulations III, Sec. 29.22 (a-2) *Compensation for Personal Services*, includes the word "tips." Obviously, if the Commissioner went beyond the purview of the legislation, such regulation and all proceedings thereunder must fall.

Koshland v. Helvering, 298 U. S. 441;

Biddle v. Commissioner, 302 U. S. 573.

Gifts by the terms of the Act itself are made expressly exempt. Section 22 (b) (3) Internal Revenue Code.

What is the meaning of the word "tip"? Is it to be considered as a transaction constituting additional compensation for services rendered as claimed by the Department, or is it a gift or alms or the bestowment of moneys prompted by alleged custom, impelled by eleemosynary

or charitable feelings of the tipper, or for other reasons not constituting compensation?

Words must be construed and defined according to their true meaning; such is the purpose of language. To determine the true definition, one must at times seek the derivation or origin of the terms.

“Tips” in the sense of a small gratuity or present to an inferior, is probably derived from an old English verb to “tip” meaning to give (citing quotations back to the year 1610); (2) to give a gratuity to, to bestow—with a coin or sum of money as the object.”—*The Oxford Dictionary*:

“A small present of money . . .; a gratuity or fee . . .”

New Century Dictionary:

“Noun—A sum of money given, as to a servant, usually to secure better or more prompt service. Verb—To bestow a gift or a gratuity of money upon, as a waiter or servant.” *Funk & Wagnalls Unabridged Dictionary*.

Webster’s Dictionary, as the trial court indicated, is not helpful since it tersely defines a tip as both a gift and a fee.

Among the references quoted in the Oxford Dictionary appears one from Thackary, as follows: “You used to tip me when I was a boy at school.”

Again in *Notes and Queries*, 9th Series, Volume 4, page 352, citing Dr. Johnson, we find the following: “To tip—to give—a low cant term from the classical dictionary of the vulgar language.”

Moreover, we find in Mr. George Simpson's book (published 1946) entitled "*A Book About a Thousand Things*," page 242, the following analysis as to the origin of tips:

"How did 'tip' originate? A curious story is told to account for the origin of tip in the sense of a small sum of money given for personal services rendered or expected. According to this story 'tip' was derived from the initial letters of the phrase 'to insure promptness.' Boxes in coffee houses were so lettered and later the phrase abbreviated to T. I. P., and from this circumstance, according to the story, *tip* and *tips* came into use. The quotations given in the Oxford Dictionary show the absurdity of this derivation."

And at page 462 of Notes and Queries above cited, a reading of J. Holden McMichaels' analysis effectively disposes of the coffee shop theory.

Although the issue in the case of *Herberts v. Laurel*, 58 Cal. App. 2d 684, has no application, since the question was whether tips constituted a part of the gross receipts of a business, the Court's definition of tip and the motive that impels it we deem most pertinent. We quote (page 694):

"A tip is not intended for the proprietor of a restaurant; it is a gratuity, *i. e.*, a free gift, a present. (28 C. J. 823.) It is intended by the donor to be in excess of the compensation paid to the donee by the latter's employer or a gift where there is neither consideration for it nor a legal obligation upon the donor to part with it. (*Wellingham v. Drew*, 117 Georgia 850.) In the western world diverse motives incite the instincts of the tipper. With some, it is to gratify the charitable impulse; with others it is the desire for gratitude or esteem or arises from a zeal

for extending one's good will. Still in others, the motive is to abide by an iniquitous practice under the compulsion of popular opinion. But whatever be the motive of the giver, his tip remains a gift to the donee. It cannot be fairly said that such gifts are intended to be additional compensation for the viands or liquors purchased from the restaurateur."

Nor can it be fairly said that such gifts are intended to be additional compensation for the taxicab ride.

The custom of tipping actually came into being long before the 16th Century. In England and on the Continent, such "gifts" were given as alms by the nobility to the subjects, serfs or inferiors, however denominated. In the early days, the lords, barons and knights would throw small coins to their inferiors. It was a customary gesture of the upper classes toward the lower classes. To say that a taxicab patron tips because it is a custom and perforce such tips are taxable, is erroneous. *We must determine whether it is a custom of paying or of giving.*

Regardless of our desire to believe that alms or gifts are *always* motivated by charitable impulses, such is not true. More often than otherwise, alms are given because John Doe did so, and to "save face," Peter Roe does likewise.

Another motivation is the desire of the bestower or tipper to demonstrate that the tippee is an inferior to the tipper.

The third analysis is that the tipper gives because he likes his fellow men.

Thus we see that the motivating impulse may be one or more of the following: A benevolent gesture indicating

the superiority of the donor; pure benevolence; or benevolence to “save face.”

Respondent saw fit to introduce evidence in support of this latter concept:

“Q. Mr. Bryson, when we discussed the matter prior to the trial of this proceeding, did you tell me that it was—you can answer this question yes or no—did you tell me that it was customary to tip, and as a matter of fact ‘Most people would feel like a heel’ to quote you, ‘if they did not.’

The Witness: There are personal reasons there.

The Court: What is that?

The Witness: It would be in personal cases. The average person, I would say, tips because it is a custom.” [Tr. 51-53.]

Perhaps respondent’s counsel is correct in such respect; doubtless many people permit benevolence to be impregnated with pride. Other persons give to indicate their importance and yet others are solely impelled by kindness. As concerns the issue, however, what boots it? Under whatever conception, the transfer is still a gift and not compensation.

Intention is a state of mind. Since the donors were not available to testify as to their donative intent, we must rely upon such reasonable inferences as may properly be drawn from the testimony, the acts themselves, the true meaning of the term tip and the attributes of the custom.

Mertens in his Work “*The Law of Federal Income Taxation*” after reviewing the *Blair* case, 33 F. 2d 286, 279 U. S. 16, *Bogardus* case minority opinion, 302 U. S. 34,

82 L. Ed. 32 and *Rice*, 41 F. 2d 339, concludes (see Paragraph 808):

“It is clear in these cases that the intention of the parties should control in determining whether the payment involved is a gift or compensation.”

See also authorities collated 67 U. S. L. P. 548, 110 A. L. R. 285, 119 A. L. R. 418; *Helvering v. National Groceries*, 304 U. S. 282; *Helvering v. American Dental*, 318 U. S. 320; see also, *Mertens*, Para. 607, Page 246.

Aside from the ordinary rules of statutory interpretation, the basic authorities under the Income Tax Act defining income, with which the writer refrains from encumbering this brief, a search of the decided tax cases avails little.

The *Bateman* case (34 B. T. A. 351) cited by the trial judge in his opinion, definitely is not applicable here. There, under the undisputed evidence, payments were made to employees of transportation companies as an inducement

“to load shipments of the Transcontinental Company and to expedite and facilitate the traffic so as to effect prompt delivery of such shipments. Payments were also made to passenger agents for sending prospective shippers to the Company.” (p. 362.) “That the congested condition of traffic and transportation competition and shortage of cars in the years in question necessitated payments of varying amounts to employees of railroads and also industries; that it was a common practice; that it was necessary to obtain cars for their shipments and to move traffic.” (p. 367.)

Perhaps the most comprehensive discussion of this subject appears in the *March, 1948* issue of "*Taxes*" in an article by George T. Altman and Harry Graham Balter, entitled "*Excludability of Tips as Gifts.*" There these eminent tax authorities take this position:

"It is not enough to say that tips are income; they must be taxable income and they are not taxable income if they fall within the scope of Sec. 22 (b) (3) (*i.e., gifts*). Citing *Bogardus v. The Commissioner*, 302 U. S. 34."

The testimony that all the services rendered by the cab drivers was covered by the fares is not controverted, all of the evidence on either side is to such effect. Moreover, respondent's counsel so stipulated in open court. [Tr. p. 47.]

Relative to the custom of tipping as being that of *paying* or *giving*, we submit that an exhaustive study lends no support to the conclusion reached by the trial court that it is compensatory. The trial judge's reasoning (in the opinion) that lessened service might result, should passengers cease tipping, and that the alleged gift being contemporaneous with the payment of fare demonstrates a payment for services, is not in consonance with the reasoning of the court in the case of *Helvering v. American Dental Co.*, 318 U. S. 322. An inducement necessarily precedes the act. The *Bogardus* case *supra*, draws a distinction between payment in consideration of services and payment in *appreciation* thereof.

Moreover, the conclusion reached in the trial court's opinion that the passenger tips because the taxicab driver expects to receive tips and the passenger expects to pay

something extra, is wholly unsupported under the evidence. Should we assume however that such inference might be drawn from the existence of a custom, it matters not. The compulsion of custom does not change a gift into a compensatory payment.

We suggest that the vast majority of people expect gifts for multifarious reasons or no reason at all. Similarly the donors expect to give. Mutual expectation cannot be considered the criterion, else we would be forced to conclude that a governmental agency might properly exceed the authority vested in it by Congress and hamstring all kindness, all benevolence and all material expressions of appreciation.

Conclusion.

We respectfully urge that the determination of the trial court that petitioner's tips constitute taxable income should be held erroneous.

Without detracting from our chief position, we urge that should this Court rule adversely to us in the foregoing respect, the arbitrary assessment sustained by the trial court be held insupportable under the record in this cause.

Respectfully submitted,

GILBERT J. HEYFRON, and
EARL E. HOWARD,

By EARL E. HOWARD,

Attorneys for Petitioners.



No. 11999

In the United States Court of Appeals
for the Ninth Circuit

HARRY A. ROBERTS AND RUTH M. ROBERTS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

MAY 14 1949

U.S. DEPT. OF JUSTICE

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Treasury Regulations 77, Art. 52	6
Treasury Regulations 86, Art. 22(a)-2	6
Treasury Regulations 94, Art. 22(a)-2	6
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 11999

HARRY A. ROBERTS AND RUTH M. ROBERTS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 12-18) are reported at 10 T. C. 581.

JURISDICTION

This petition for review (R. 19-22) involves federal income taxes for the taxable year 1943. On May 29, 1946, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in the total amount of \$144.34. (R. 6.) Within 90 days thereafter, and on August 21, 1946, the taxpayer filed the petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 3-5.) The decision of the Tax Court sus-

taining the deficiency was entered April 2, 1948. (R. 19.) The case is brought to this Court by a petition for review filed June 24, 1948 (R. 19-22), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Were tips received by the taxpayer, a cab driver, in 1943, "compensation for personal service" and thus taxable income under the provisions of Section 22(a) of the Internal Revenue Code?

2. Did the Tax Court properly sustain the Commissioner's determination that taxpayer's tips received in 1943 were conservatively 10 per cent of his gross fares?

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, * * *

* * * *

(26 U. S. C. 1946 ed., Sec. 22.)*

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(a)-2. *Compensation for Personal Services*.—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips,
* * *

* This was amended by the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, in respects not here involved.

STATEMENT

The facts as found by the Tax Court are as follows in so far as pertinent to this appeal (R. 12-13) :

The petitioners are husband and wife. They filed a joint federal income tax return for the taxable year with the Collector for the Sixth District of California. During the taxable year the petitioner, Harry A. Roberts (hereinafter referred to as taxpayer), was employed as a taxicab driver by the Yellow Cab Company of California, in Los Angeles. During the year he received from patrons sums of money, ordinarily called "tips," in addition to the regular established fare for the transportation of patrons. He kept no record thereof. About 50 per cent of passengers tipped. He had instructions, in his contract with the Yellow Cab Company, not to solicit tips, was forbidden to do so, and did not do so. He was allowed to charge only what the taxicab meter showed. In his contract incidental service, such as, carrying of bags, was included in the wages received. His wages were, in 1943, 45 per cent of the take, or \$6 a day, whichever was greater. He worked in 1943 about 240 to 250 days. A 50 cent fare is typical, and the usual tip therefor is 10 cents. It is the same for an 80 cent fare. A \$1 fare usually does not carry a tip. On a 30 cent fare the tip is usually 10 cents, sometimes 15. The average fare is about 80 cents. On \$10, \$5, or \$3 trips there is usually no tip. On a \$15 or \$20 trip, which is uncommon, the average tip would be 25 to 50 cents. There would be five or six \$5 trips, and not more than one \$10 trip in a month. He conveyed passengers under charge accounts also and those who used Yellow Cab script, from whom no tips were received. The year 1943 was better than average; gasoline rationing approximately trebled the number of

taxicab patrons so far as tips were concerned. A tip is rarely less than 10 cents. Tips average, conservatively and reasonably, 10 per cent of gross bookings. Tips were more liberal during war time than in ordinary times.

SUMMARY OF ARGUMENT

Tips were given to taxpayer, a cab driver, as a method of compensating him for service properly rendered. No evidence was introduced which would indicate the existence of a "donative" intent, nor would the relationship between cab driver and passenger indicate such intent. A cab driver expects to receive something extra for his service, and the passenger expects to pay it. Being a form of compensation, tips are taxable income under Section 22(a) of the Internal Revenue Code and have been held to be taxable income under the Regulations promulgated by the Commissioner over the last thirty years.

Since taxpayer kept no records of tips received, the Commissioner, after investigation, determined the taxpayer's tips were conservatively 10 per cent of his gross fares. The Tax Court sustained this determination, and the evidence in support of the Tax Court's finding was abundant. Since the finding was not clearly erroneous, it should not be disturbed on appeal.

ARGUMENT

I

Tips received by the taxpayer, a taxicab driver, during the year 1943 are taxable income within the meaning of Section 22(a) of the Internal Revenue Code

Section 22 (a) of the Internal Revenue Code, *supra*, defines gross income as follows:

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from sal-

aries, wages, or *compensation for personal service*, * * * (Italics supplied.)

It is difficult to conceive of anything that might more appropriately be characterized as "compensation for personal service" than tips customarily given to cab drivers, bellboys, waiters and the multitude of those whose livelihoods similarly depend on the rendering of personal service to the public. To insist that tips constitute gifts as distinguished from compensation merely because they represent sums which the driver is forbidden to solicit, and which the passenger is not legally required to pay, is to ignore the essential nature of the practice of tipping. It is very well established that the mere absence of a legal obligation to pay is not determinative; and, indeed, cases are numerous in which voluntary payments to employees for past service have been held to be compensation, often where the payments were deferred until substantially after the services were rendered. *Schumaker v. United States*, 55 F. 2d 1007 (C. Cls.); *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716; *Botchford v. Commissioner*, 81 F. 2d 914 (C.C.A. 9th). See Magill, *Taxable Income* (Rev. ed. 1945), p. 402.

One can hardly question the causal relationship between the rendering of service by the taxpayer and the payment of tips. The tips are paid contemporaneously with the payment of the fare and are to a certain extent proportional to the amount of the fare. It is apparent that the size of the tip is substantially dependent upon the efficiency and courtesy with which the service is rendered; and, as the Tax Court indicated, one's imagination need not be strained to visualize the probable deterioration in service resulting if passengers ceased to tip. The practice of tipping is simply a common

method of compensating those who satisfactorily render personal service. On the other hand, tips represent a substantial and anticipated source of income to cab drivers, waiters, etc. In short, the passenger in a cab expects to pay a little extra for good service; and the driver expects to receive a little extra.

Moreover, because tips are an anticipated source of income, they are a significant factor in fixing the wages of those engaged in personal service occupations. If the practice of tipping were abolished, the ultimate result would be simply an increase in the wages of the cab driver, which would, of course, be reflected in the fare paid by the passenger.

It is precisely for these reasons that tips have been consistently held to be "compensation for personal service" and thus taxable income under the Regulations. Regulations 111, Section 29.22(a)-2, *supra*, defines "compensation for personal service" as follows:

Compensation for Personal Services.—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, * * *.

Similarly, tips have been classified as compensation in all corresponding Regulations promulgated over the last three decades. Regulations 103, Section 19.22(a)-2, promulgated under the Internal Revenue Code; Regulations 101, Article 22(a)-2, promulgated under the Revenue Act of 1938; Regulations 94, Article 22(a)-2, promulgated under the Revenue Act of 1936; Regulations 86, Article 22(a)-2, promulgated under the Revenue Act of 1934; Regulations 77, Article 52, promulgated under the Revenue Act of 1932; Regulations 74, Article 52, promulgated under the Revenue Act of 1928; Regulations 69, Article 32, promulgated under the

Revenue Act of 1926; Regulations 65, Article 32, promulgated under the Revenue Act of 1924; Regulations 62, Article 32, promulgated under the Revenue Act of 1921; Regulations 45 (1919 ed.), Article 32, promulgated under the Revenue Act of 1918.

It is hardly necessary to reiterate the familiar principle that these Regulations are entitled to serious consideration, especially since the pertinent language of what is now Section 22(a) of the Internal Revenue Code has been continually re-enacted without material change during the 30-year period in which the above Regulations have been in existence. *Coast Carton Co. v. Commissioner*, 149 F. 2d 739 (C.C.A. 9th).

The issue of the taxability of tips as income has not, in the past, been presented to the appellate courts, nor has it been directly presented to the Tax Court until very recently. However, to the extent that the general problem of tipping has been directly or indirectly before the Tax Court, the opinions of the Tax Court have uniformly indicated that tips are a form of compensation. In the case of *Cesanelli v. Commissioner*, 8 T. C. 776, the Tax Court sustained the imposition of a fraud penalty against the taxpayer, a waiter, for failure to report the full amount of tips received. Although it is true that the taxpayer did not consider the question of the taxability of the tips as income of sufficient merit to raise the issue, the Tax Court must have concluded that they were taxable income, since the taxpayer would otherwise have not been guilty of fraud in failing to report and pay taxes on them. In the case of *Bateman v. Commissioner*, 34 B.T.A. 351, the Board of Tax Appeals held that tips paid by the taxpayer to shipping clerks and railroad and steamship employees were deductible as business expenses under Section 23(a)(1)

(A) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 23). The decision required the conclusion that tips were not gifts but were compensation for services rendered. In the case of *Foster v. Commissioner*, decided February 27, 1948 (1948 P-H T.C. Memorandum Decisions Service, par. 48,024), the Tax Court had presented to it directly the question of the taxability of a cab driver's tips as income and decided, as here, that tips were compensation and taxable income.

The Government is in agreement with taxpayer that *Herberts v. Laurel*, 58 Cal. App. 2d 684, which taxpayer cites at some length (Br. 10), "has no application." The issue there was whether tips constituted gross receipts of the business, not whether they were compensation to those who received the tips. The additional authorities cited by taxpayer have been carefully examined, and none appear to support in any way the contention that tips such as those here received are gifts.

Taxpayer's research on the etymology of the word "tip" has led to conclusions of dubious significance. He has ascertained that in Sixteenth Century England and Europe, tips were a kind of alms or present, given by the nobility to serfs and other inferiors. It is difficult to perceive what bearing this has on the nature of tips and the practice of tipping in modern Los Angeles, especially since the nature of tipping is a matter of common knowledge. Taxpayer, however, concludes that tips are often given by passengers as a mark of superiority over the cab drivers, rather than as a compensation for personal service. It is, perhaps, a matter of common knowledge that taxpayer's view of the nature of a tip is not generally shared by cab drivers as a class.

Taxpayer while pointing out that the definition of tip in Webster's Dictionary is not helpful since it defines tip as both a gift and a fee, sets forth the definitions in the Oxford Dictionary and the New Century Dictionary as authority. (Br. 9.) The Oxford Dictionary defines tip as a "gratuity or fee". The definition set forth from the New Century Dictionary begins: "Noun—A sum of money given to secure better or more prompt service." It is not easy to perceive what help taxpayer hopes to receive from these citations. The former, of course, defines tip in both senses as a gift and as a fee. The latter indicates that tips are given to insure better service, which would indicate that they are compensation for services. Taxpayer (Br. 11) advances the contention that many people tip because "John Doe did so" and to "save face". It is not the accuracy but the significance of the observation which seems doubtful. That tipping exists largely by the force of custom is agreed. As indicated previously, a cab driver expects to receive a little extra for his services and the passenger expects to pay a little more.

Taxpayer argues (Br. 14) that it is necessary to determine that tips not only are income but that they are taxable income, and that they are not taxable income if they are gifts. The position of the Government has been that the tips received by taxpayer are income because they are patently "compensation for personal service." Payments in compensation are not gifts.

There is nothing in the evidence adduced by taxpayer, or in the relationship itself between cab driver and passenger to indicate the existence of a "donative" intent.

The Tax Court properly sustained the Commissioner's determination that tips received by the taxpayer in 1943 were conservatively 10 per cent of the gross fares

Taxpayer admittedly received tips during the year 1943, but kept no record of the amounts received (R. 25), nor did he report any sum as representing tips on his 1943 return (R. 24). The information as to the exact total of the tips received by taxpayer in 1943 was peculiarly within the knowledge of the taxpayer; and it was consequently necessary for the Commissioner to determine by investigation a fair and reasonable estimate of the tips received by taxpayer in 1943. The Commissioner determined that 10 per cent of the taxpayer's gross bookings was a reasonable estimate of the tips received in 1943, and the burden was, of course, on the taxpayer to overcome the presumption in favor of the validity of the Commissioner's determination. In support of his contention that the determination was unreasonable, taxpayer testified that about $\frac{1}{2}$ of his passengers tipped and that the tips amounted to 10 per cent of the fares of those who tipped, or 5 per cent of the total fares. (R. 10.) On cross examination taxpayer testified that the typical fare was 50 cents for which the usual tip was 10 cents; that an 80 cent fare would bring a 10 cent tip; that the usual tip for a 30 cents fare was 10 cents to 15 cents; that the majority of passengers gave no tip if the fare were \$1. (R. 27-29.) On redirect examination taxpayer testified that he received 10 to 20 cent tips on \$1.80 fares, that he rarely received tips on \$5 to \$20 fares and that he carried some passengers on charge accounts who did not usually tip. (R. 31-32.)

Taxpayer's testimony showed only that tips customarily varied from 0 to 50 per cent of the fare. He gave no indication of the approximate number of trips at the respective fares, or the number of charge trips. Apart from taxpayer's bald assertion that the tips received were approximately 5 per cent of the gross fares, there was nothing in his recitation of basic facts upon which the Tax Court could have concluded that the determination of the Commissioner was erroneous.

One other witness testified for the taxpayer, Mr. Philip Davis, a cab driver and representative of an organization of 350 cab drivers formed to deal with income tax problems of the group. (R. 35.) Upon being asked what he considered a fair percentage basis in determining the relationship between tips received by cab drivers and the fares of those passengers who tipped, he replied as follows (R. 38):

Oh, I don't know. I would more than likely concur to Mr. Roberts' estimate on that, about 10 per cent. It would in this matter. I might make an explanation to that, that you get your ten, occasionally your quarter, on your short trips or on your long trips, but you wouldn't get your ten per cent proportionately on a two or three dollar trip, basing it on a 50-cent estimate of a dime.

The unsatisfactory nature of this nebulous adoption of the taxpayer's testimony is manifest.

Three witnesses testified for the Government on this issue. Mr. Orville Richardson, personnel director of the Yellow Cab Company of Los Angeles, and previously traffic superintendent, starter, and taxicab driver, testified that he kept records of his tips for the years 1941, 1942, and part of 1943 and 1946, and the tips average "at least" 10 per cent of the gross fares.

(R. 49.) He testified further that a 10 per cent average of tips to gross bookings is a "conservative" estimate of tips received by the average cab driver who drives the Yellow cab. (R. 49-50.) Although it is true that Mr. Richardson did not drive taxicabs during the greater part of 1943, the testimony of taxpayer's own witness, Mr. Davis, indicated that "tips" were if anything more liberal in 1943 than during the prior years. (R. 36.)

Mr. Lloyd E. Bryson, a cab driver of 17 years' experience and a driver for the Yellow Cab in the year 1943, testified that 10 per cent would be a fair and reasonable estimate of the percentage of tips to gross bookings. (R. 53.)

Mr. Robert Hendry, a driver of Yellow cabs in Los Angeles for 16 years, testified that 10 per cent is a "very reasonable" estimate of the percentage of tips to gross fares. (R. 56.)

The Tax Court apparently chose to believe the disinterested testimony of the Government's witnesses, all of whom worked for the same taxicab company and in the same general area as the taxpayer.

Under Section 36 of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., the scope of review exercised by the United States Courts of Appeals over decisions of the Tax Court shall be the same as that exercised over "decisions of the District Courts in civil actions tried without a jury". That being so, Rule 52(a), Rules of Civil Procedure for the District Courts, will apply. Rule 52(a) provides in part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". It is manifest that the findings of the Tax Court in the instant case are not clearly erroneous, especially when

regard is given to the opportunity the Tax Court had to judge of the credibility of the witnesses.

There was nothing in the testimony of the taxpayer to support his contention that tips received by him in 1943 were less than the amount determined by the Commissioner apart from his unsupported assertion to that effect. He kept no records. His testimony as to amounts customarily given as tips for various fares provided no basis for the conclusion that the Commissioner's determination was erroneous. The unsatisfactory nature of the testimony of Mr. Philip Davis has already been noted. The testimony of both witnesses was, of course, subject to the possibility of being colored by self-interest.

The three witnesses who testified for the Government, on the other hand, were disinterested. If anything, their interests were adverse to the Government's. Due to the fact that they had worked in the same general area as the taxpayer and for the same taxicab company, they were eminently qualified to testify on the matter involved. One of the three, Mr. Orville Richardson, was the only witness to testify who had actually kept records of tips received. Indeed, it is difficult to see how the Tax Court could have arrived at any other conclusion. Since it is apparent that the findings of the Tax Court are not clearly erroneous, they may not be disturbed on appeal.

CONCLUSION

Tips received by the taxpayer were simply a form of compensation for services properly rendered, and, as such, constitute taxable income. In the light of taxpayer's failure to keep records of his tips, and in view of the fact that there was abundant evidence to support the Tax Court's finding that tips received by the tax-

(R. 49.) He testified further that a 10 per cent average of tips to gross bookings is a "conservative" estimate of tips received by the average cab driver who drives the Yellow cab. (R. 450.) Although it is true that Mr. Richardson did not drive taxicabs during the greater part of 1943, the testimony of taxpayer's own witness, Mr. Davis, indicated that "tips" were if anything more liberal in 1943 than during the prior years. (R. 36.)

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CONCLUSION

Tips received by the taxpayer were simply a form of compensation for services properly rendered, and, as such, constitute taxable income. In the light of taxpayer's failure to keep records of his tips, and in view of the fact that there was abundant evidence to support the Commissioner's finding that tips received by the tax-

payer were conservatively 10 per cent of his gross fares in 1943, as determined by the Commissioner, the finding of the Tax Court should be upheld and the judgment of the Tax Court should be affirmed.

Respectfully submitted,

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OCTOBER, 1948.

